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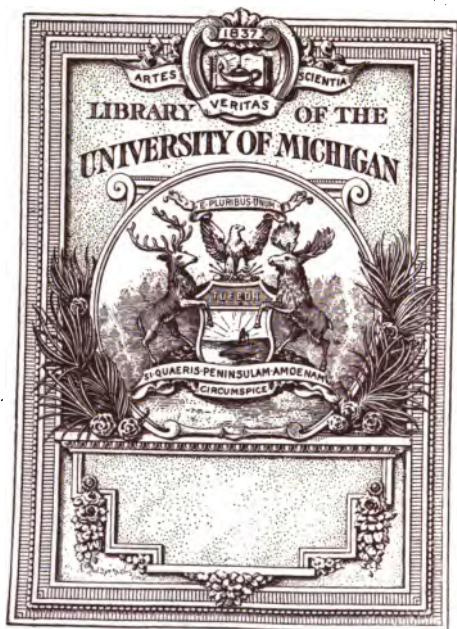
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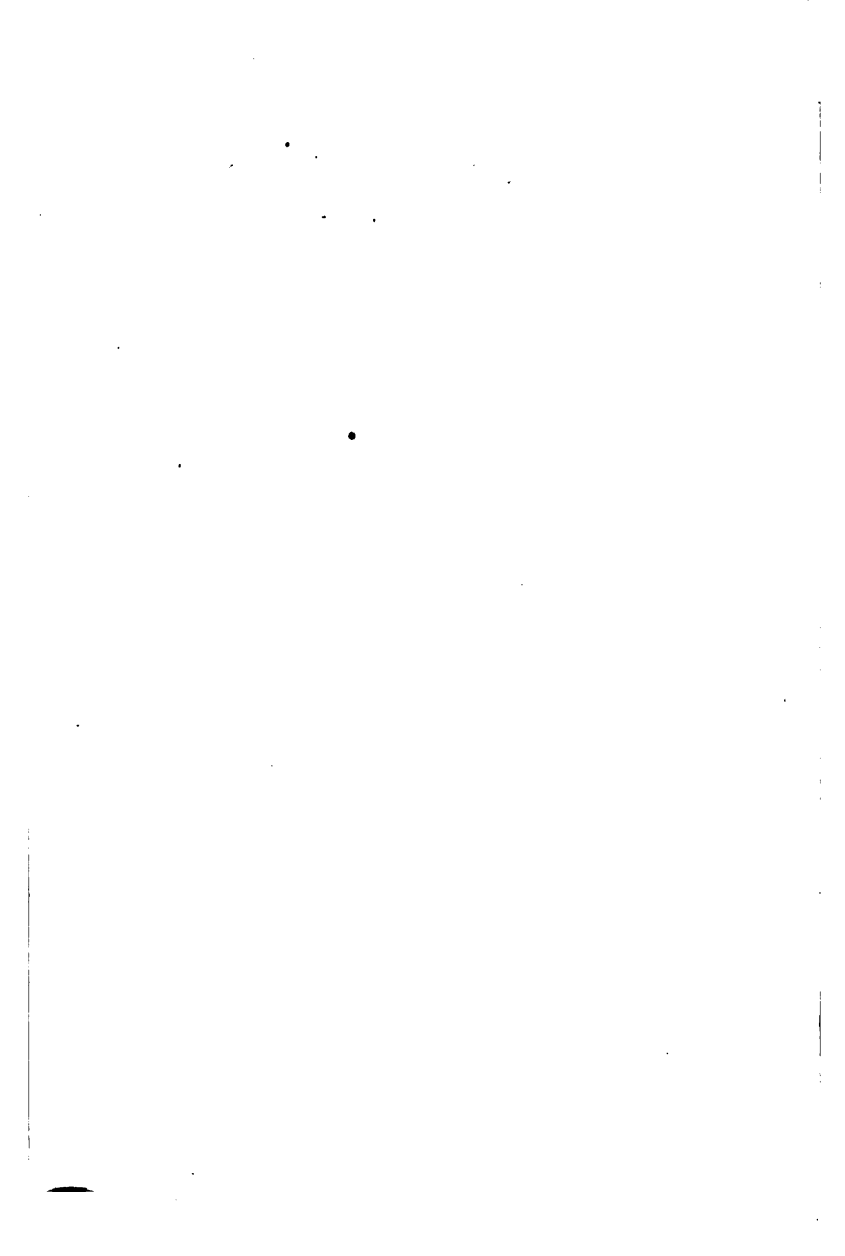
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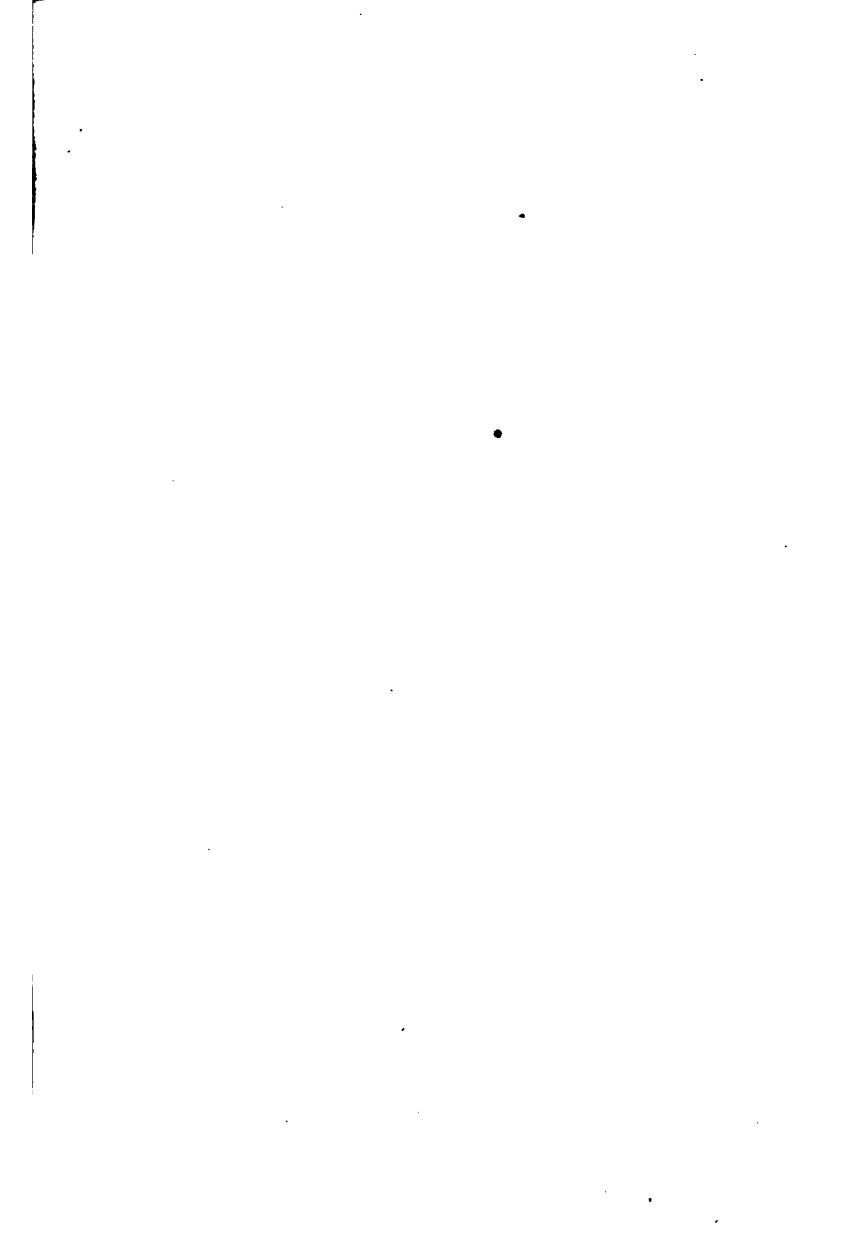
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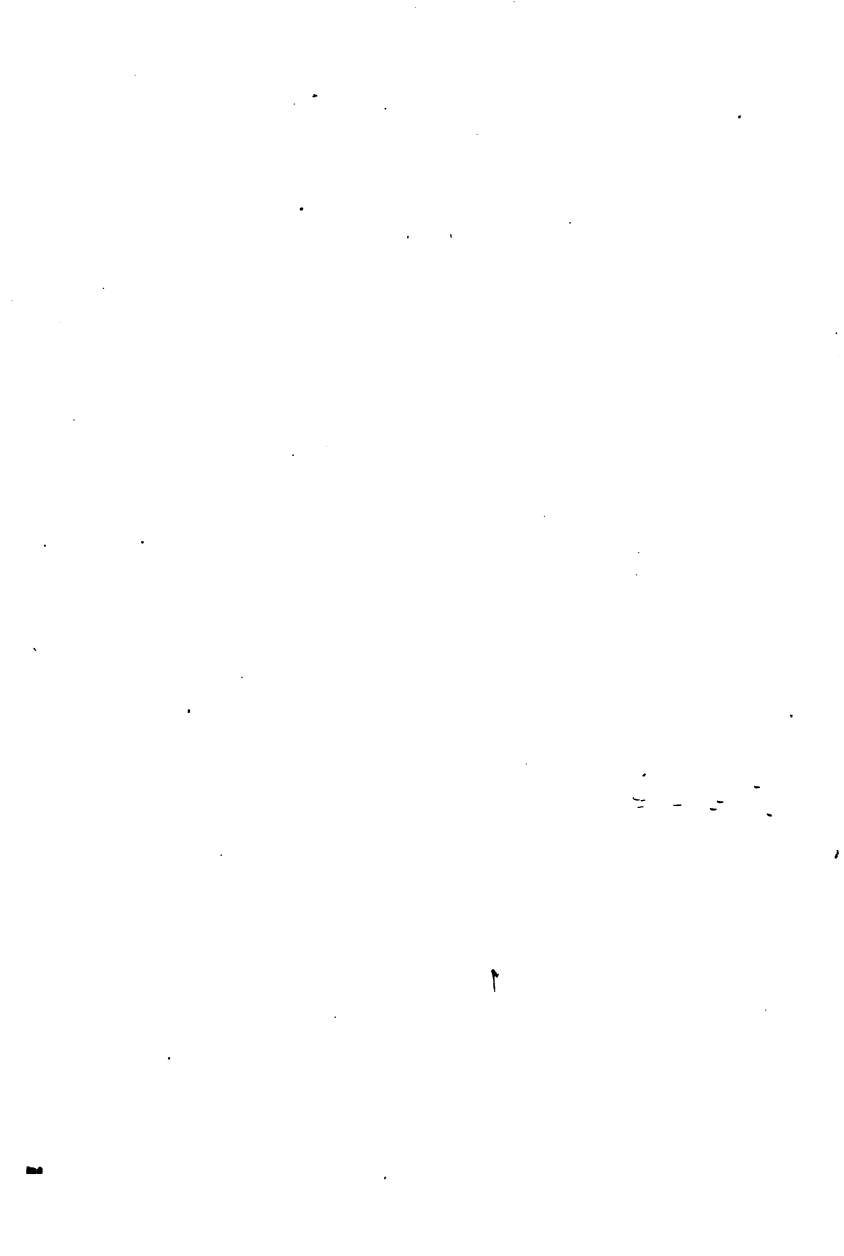


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THE ELEMENTS
OF
COMMERCIAL LAW

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BY
ALBERT S. BOLLES, PH.D., LL.D.

LECTURER ON THE LAW AND PRACTICE OF BANKING IN THE UNIVERSITY
OF PENNSYLVANIA, AND LECTURER ON BANKING AND
COMMERCIAL LAW IN THE DREXEL INSTITUTE



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COMMERCIAL LAW.

INTRODUCTION.

1. Origin of commercial law.
2. Legal decisions.
3. Kinds of law, written and unwritten.
4. What is a contract?
5. Sealed and unsealed contracts.

1. Commercial law pertains to commerce; in other words, it treats of contracts. To a very considerable extent, commercial law is the outgrowth of customs. By these are meant such ways of doing things as are generally practiced among men and which are declared by the courts to be proper and legal.

2. Customs, however, are not the only basis or foundation of commercial law. The judges often declare rules or principles created by themselves. In administering justice, necessity requires them to do this when no rules exist that can be properly applied. Besides judge-made law there are statutes that either repeal or modify other laws, or embody new rules of action.

3. Thus commercial law springs from two

sources : customs with additions made by the judges, and statutes enacted by the legislative department of government. The law originating in customs is called the common or unwritten law, and the laws enacted by legislatures are called statutes or the written law.

4. A contract is an agreement to do, or not to do, a particular thing. As a legal term, it is of recent use. Indeed, most of the principles of commercial law are of modern origin.

5. The most general division of contracts is into simple contracts and specialties. A specialty is in writing, to which a seal is added after the name of each contracting party. A simple contract includes all kinds that are not thus sealed.* They may be verbal or written contracts. They are often called parol contracts. Perhaps this term is more frequently used by the courts than any other. In some cases the law requires that contracts must be sealed, but much more frequently contracts are either verbal, or written without the addition of a seal. Formerly, when people could not write, much more attention was given to the use of a seal, than is given to it at the present time. Nevertheless, there are some peculiarities relating to sealed contracts, especially in the way of evidence. For example, a cause or consideration for making a sealed contract need not be

* See Sec. 2, p. 20.

proved, because the law assumes that a consideration was given. A person who wishes to enforce or compel another to perform a verbal or unsealed contract must show that there was a consideration for making it.

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CHAPTER I.

PARTIES.

1. Who is a minor or infant ?
2. Contracts of a minor for necessities.
3. What are voidable contracts ?
4. Effect of a promise to pay afterward.
5. If his contract is not avoided it remains in force.
6. Validity of a note for necessities.
7. He cannot bind himself when he has a guardian.
8. But he may with his guardian's consent.
9. If he avoids his contract, he can take no benefit from it.
10. Contracts of married women.
11. Contracts of aliens.
12. Contracts of drunken persons.
13. Contracts of insane persons.

1. Not every one can make contracts or agreements. Persons under twenty-one years of age cannot make them. In law they are called infants or minors ; and infancy disables them from making contracts, except for those things that are needful to sustain their lives and health, in other words, for necessities. In most states infancy ends at the age of twenty-one, but in some of them women are regarded as of full age at eighteen. A person becomes of age at the beginning of the day before his twenty-first birthday. This does not harmon-

ize with the general idea. The reason for the law, though not a very sound one, is the non-recognition by the courts, except in those cases imperatively required by justice, of parts of a day. A person therefore born on the ninth of May in the year 1870 becomes of age at the beginning of the eighth of May, 1891. If he were born at the beginning of the ninth, at the end of the eighth, twenty-one years afterward, he would have lived the full period of infancy. If he were born at the end of the ninth, as he became twenty-one at the beginning of the eighth, two days in truth would be lacking to complete the full infantile period. Yet as fractions of the day are not regarded, whenever the day preceding the birthday arrives, the period of infancy is ended.

2. The contracts of persons not of age may be divided into two classes : contracts for necessities, and for other things. Contracts for necessities are binding on persons even though they are not of age, and this rule is established for their benefit and protection. But it is not always easy to distinguish between the things that are strictly necessary and other things. First of all, a thing may be regarded as necessary by one that would not be by another, depending on varying conditions of life. Usually, however, there has not been much difficulty in applying this rule of law. Necessaries include not only the things needful to support life, but such as are suitable

to an infant's degree and estate; and the question, if disputed in a court of law, is a proper one for a jury to decide, whether they were so or not, and whether they were furnished at reasonable prices. Cases are constantly arising in which minors seek to avoid their contracts, but having had the benefit of them they are required by the law to fulfil them. Sometimes, when a minor's extravagance is clearly proved, and sellers must have known that his purchases were not needed, they have failed to collect their bills. One of these cases was decided long ago by Chief Justice Gibson. The bill exceeded a thousand dollars, and included twelve coats, seventeen vests and twenty-three pairs of trousers within fifteen months and twenty-one days, besides five canes, fur caps, chip hats and other things. The judge remarked that such a bill made him shudder, and yet the jury decided that the merchant could recover almost the whole of the amount. The judge said there was no reason for regarding such things as necessaries, and that it was the merchant's duty to know, not only that the supplies were unexceptionable in quantity and kind, but also that they were actually needed. When, for the purpose of relieving the minor, he assumed the business of guardian, he was bound to execute the duty as a prudent guardian would do, and consequently to make himself acquainted with the ward's necessities and circumstances.

3. Contracts for other things than necessities are not absolutely void, but voidable. In other language, a minor may disavow them, either before he has attained his majority, or within a reasonable time afterward. As he may avoid them, so may they be ratified and confirmed, if he pleases, and by word only. But merely to acknowledge a debt is not enough. The law says this must be done substantially, if not in form ; a new promise must be given to pay it. In some of the states a statute requires the new promise to be in writing and signed by the promisor, otherwise he is not liable.

4. The promise must be after he has attained full age. The law does not require the use of any particular words or phrases for this purpose, but the description of the debt and the promise must be clear enough for the creditor to understand the promisor. It must also be made voluntarily and for the purpose of assuming a liability from which he knows that the law has relieved him. If the promise be conditional, the condition must be proved before the promise can be enforced. Thus, if a merchant should rely on a new promise, and assert that the minor said that after he had reached full age he would pay the debt as soon as he was able, the merchant must also prove that he was able to pay at the time of trying to recover the debt.

5. If a minor's contract is not avoided, it re-

mains in force. What is the effect of remaining silent? As a general rule, mere silence is not a confirmation, because a contract may be disaffirmed when an attempt is made to enforce it. But a minor may do many things from which a confirmation may be established. For example, if he should buy property and, after reaching his majority, should sell it, this would be a confirmation of his purchase; and generally a continued possession and use of a thing is evidence of a confirmation. For example, if a minor should buy a horse and give his note for the amount, he might, after he had attained his majority, return the horse and refuse to pay the note. But if he kept the horse, this would be regarded as a confirmation of the note. The evidence of confirmation would be still stronger if there was a refusal to deliver the thing when it could be redelivered.

6. If a minor should borrow money for the purpose of spending it in purchasing necessities and give his note, it has been decided that the debt or the note could be avoided by the minor, but it is now certain that he would be liable for the debt; and he is also liable for money paid at his request for necessities.

7. A minor cannot bind himself even for necessities, when he has a guardian or parent to supply his wants. Unable from want of sufficient discretion to judge what is best for himself, or to dispose of his property, his guardian or parent

can act for him and protect him. This safeguard though would be of little worth if a third person could deal directly with a minor and bind him by his contract. He would be left exposed to the consequences of his own foolishness, and to the craft of others. Persons, therefore, who desire to supply the wants of a minor who has a parent or guardian, must contract with him.

8. A minor, however, may bind himself by a contract for necessities, and also for things used in carrying on the business in which he is engaged, with the consent of his guardian. On one occasion a guardian put his ward in possession of some land to cultivate it, and furnished him with a yoke of oxen for that purpose. "Did not this," so the court inquired, "imply an authority from the guardian to the minor to buy a plow and harrow, and to hire additional labor to make hay and gather his harvest, which he could not do alone?" And the question was answered in the affirmative.

9. A minor who avoids a contract can retain no benefit from it. Thus, if he contracts to sell a thing and refuses to deliver it, he cannot demand the price; or, if he contracted to buy a thing and refuses to pay the price, he cannot demand the thing purchased.

10. Another class of persons who are not perfectly free to contract are married women. By

the common law a married woman had very little authority to make contracts. The law gave all the personal property she had in her possession to her husband, and rendered him liable for all her debts, and shielded her from any engagements she might make; but by statute in all of the states her authority to make contracts has been greatly enlarged. In general, these statutes give her authority to sign notes and other obligations, and to engage in business, buy and sell real estate and other property almost as freely as though she was unmarried. Some restrictions, however, remain in selling real estate, and in becoming responsible for the debts of her husband and others. As the statutes of each state differ in some way, and are limited in their operation to the state enacting them, they are not given here.

11. Other persons who are not always free to make contracts are aliens. By the common law they had no authority to own or hold real estate, nor could they give a good title to it by contract, or transmit a good title to their heirs. But their disabilities have been removed in all the states by statute, so that they can own property and make contracts like other persons.

12. Two other classes may be mentioned who are incapable, to a considerable degree, of making contracts—drunken people and persons who are insane. By the old rule of law, if a man made a contract when in a state of intoxication he was,

nevertheless, liable; his intoxication was no excuse or defense. But this principle has long since given way to one that is in better harmony with justice. A person who is so destitute of reason as not to know the consequence of his contract, even though this state of mind was produced by intoxication, is not obliged to fulfill or execute it. This principle applies in all cases between the immediate parties to the contract, but if it be a note, for example, that has been transferred to a third party, who knows nothing about the drunkenness of the maker, is he thereby affected? In other words, can the maker urge his drunkenness as an excuse for not paying an obligation innocently and rightfully in the possession of a third person who has paid money for it? The law declares that in such a case the maker must pay, and for a very good reason, that when a loss must be borne by one of two innocent persons the one who occasioned it must be the loser. As between the contracting parties, as we have remarked, when one of them is so drunk that he does not know what he is doing, the contract is wholly void if the other knew of his condition; but if the note is innocently taken by another, then the maker must bear the loss.

13. A different rule applies to the contract of an insane man. Like a person who has not attained his majority, he is liable on a contract for the necessities of life that have been furnished to

him, and he would also be liable for merchandise innocently furnished to his order by a person who did not know of his infirmity. Insanity is a permanent state or condition of the mind that disables one from taking care of himself; drunkenness is a temporary disability that is voluntarily produced. Insanity is a misfortune; drunkenness is a vice. No man voluntarily does an act necessarily producing madness in order that he may become insane, but men drink that they may become drunk, and when they thus deprive themselves of the use of their reason and voluntarily expose themselves to fraud, the law wisely refuses to treat them with the same tenderness that it does those unfortunate beings who are deprived of their understanding.

CHAPTER II.

CONSIDERATION.

1. There must be a cause or consideration for a contract.
2. But it need not always be proved.
3. Especially of negotiable notes.
4. Meaning of consideration.
5. Kinds of consideration.
6. A consideration must have some real value.
7. A voluntary contract cannot be enforced.
8. A promise to pay another's debt is of this character.
9. An agreement to accept part of a debt for the whole is void.
10. A note procured by fraud is worthless.
11. So is a contract founded on an illegal consideration.
12. The legal part of a divisible consideration can be enforced.
13. The compromise of a criminal charge is not a valid consideration.
14. Work or service is a consideration for a promise to pay it.
15. The worth of a part of an agreed service can be recovered.
16. There can be no recovery for a voluntary service.
17. A promise is a good cause or consideration for a promise.
18. A contract cannot be enforced which cannot possibly be performed.
19. A contract resting on a consideration that has wholly failed cannot be enforced.

20. Illustration of the principle.

21. The consideration for changes in building contracts.

1. There must be a cause or consideration for every contract.* In other words, a person will not make a promise without a cause or consideration for doing so. A promise is not made for nothing. If there is no consideration for a promise the negotiation or undertaking is a naked bargain, and the promisor, or person who makes the promise, even though admitting this, is under no legal requirement to perform his promise. In no case can a person be required to fulfill a promise or contract that is not based on a consideration.

2. Though a consideration is always required, in some cases the proof that one was given may be omitted. A prominent case is a promise in writing to which a seal is added to the promisor's name. The nature of a sealed instrument has been explained. A deed is the most familiar illustration of a sealed instrument. No consideration need be proved, because the law presumes that there was one. Suppose that two writings are similar in form, and that one is sealed and the other is not. The law supposes or assumes that a sealed instrument is drawn with care, is of more solemn character than an unsealed one. The law, therefore, assumes or

*See Sec. 4 in this chapter.

implies that there was a consideration in the one case, while in the other it must be proved. There are many principles of the law founded on reasons that grew out of conditions or circumstances that no longer exist. In the olden time, when people could not write their names perhaps, much less deeds and other papers, they used seals as proofs of their signatures. Every person had a seal of his own, and whenever he used it the writing was regarded as important; it was supposed to be prepared with care; all the formalities had been remembered, and especially the cause or consideration. Consequently, the law did not require any proof of a consideration in such cases. In modern times, while many an unsealed instrument is drawn with just as much care, while a seal conveys no special or distinctive mark or characteristic, as most all seals are alike, nevertheless a different rule of proof applies to sealed, from that applied to unsealed instruments.

3. The most common exception of an unsealed instrument, whose consideration need not be proved, is a negotiable note, because it is implied. This rule prevails everywhere with respect to negotiable paper.

4. The word consideration has a peculiar meaning. It denotes some substantial cause for the promise. This cause may be one of two things, either a benefit to the promisor or an in-

jury or loss to the promisee in consequence of the promisor's conduct or request. Thus, if A promises B to pay him a thousand dollars in three months the promise is worthless in law, even though it be made in writing, for such a promise is merely voluntary and is without any consideration. Why should A make such a promise; what does he get for it? Nothing. As nothing is received or expected, the law protects him, even though he is so foolish as to make such a promise, against B's enforcement of it. But a very slight advantage to one party, or a trifling inconvenience to the other, is a sufficient consideration to sustain a contract.

5. Considerations are of two kinds—good and valuable. A good consideration is that of blood, or of natural love or affection; for example, the grant or sale of an estate to a near relation. Such a consideration is founded on motives of generosity, prudence and natural duty. A valuable consideration is money or the like, and is founded on motives of justice. A valuable consideration is usually pecuniary, or convertible into money.

6. If a consideration is valuable, it need not be adequate. In other words, a court will not inquire into the exact proportion between the value of a consideration and that of the thing to be done or given for it. But it must have some real value, and if this be very small, this circumstance may, even by itself, and still more when strengthened

by other facts, imply or sustain a charge of fraud. Courts refuse to overthrow contracts on questions of mere adequacy, but if they are unreasonable or hard, though without fraud, courts will sometimes not require their fulfillment, and will give only reasonable damages to the person who seeks compensation from the other in consequence of his failure to fulfill or execute his undertaking.

7. In many cases the question has arisen, whether there was a good or valuable consideration for the undertaking. And first we may remark, that a voluntary contract without any consideration cannot be enforced. The reason for this rule has already been stated. It not unfrequently happens that such a promise is made, and it may seem an immoral or unjust thing, perhaps, for a person to disregard it; but, on the other hand, why should a court compel a person to do something for nothing? But if the promisor is to get something, or the other party is to lose something by the promise, then the contract can be enforced.

8. A promise to pay the debt of another, without a consideration, is of a similar character and void. A promissory note, therefore, given by a widow for a sum due to her husband's creditor, is without consideration and cannot be recovered. Why should she pay it, as she has received nothing?

9. An agreement between a debtor and creditor

to accept, at a future time, a part of a debt for the whole of it, is void for want of a consideration. Of course, an actual acceptance of a part of the money due from a debtor in discharge of the whole amount would be a lawful and binding transaction. But an agreement to accept, at a future time, a part for the whole is of a different character. Why should he give up a portion of his debt for nothing? To this rule, though, there are many exceptions. For example, when the amount of the claim is disputed, or mutual unsettled demands exist, or the creditor receives some new benefit or advantage. These are exceptions to the above rule. A promise to accept less than the full face amount of a doubtful claim is always valid.

10. A note procured by fraud is generally worthless, and the door of justice is shut against its collection, but the mutual fraud of the parties to a note is a binding consideration. Says an eminent jurist: "It is not the province of the law to help a rogue out of his toils. The rule is to leave the parties where it finds them." Thus, A., who feared bankruptcy, and for the purpose of defrauding his creditors, gave his property to his brother B., taking four notes from him. As the transaction was a mutual fraud, B. could not have escaped had A. demanded the payment of either of the notes. As B. could not set up his own fraud as a defence against the person to whom

they were payable, neither could he make this defense against a bank that had taken one of them as security for a debt.

11. A contract founded on an illegal consideration, that is, one that the law does not recognize, is worthless. It enters directly into the instrument and destroys its validity, because the law will not permit itself to be violated with impunity. For this reason a promissory note given in a gambling transaction is void, though it is negotiable in form and is in the possession of an innocent holder or owner, who has given value or money for it. If such a note were collectible by a third party, the law which declares all gambling transactions void could be defeated. Notes or other instruments might be given in payment of bets or wagers, and then by transferring them to a third party their collection could be assured. The law, therefore, declares that such instruments are worthless, whether they come into the possession of innocent holders or not. For the same reason a promissory note given to a broker to cover losses incurred in a stock gambling transaction is void in many states, wherever the contract is regarded as a wager.

12. If the consideration for a contract is single or entire, part of which is legal and part of which is illegal, there can be no recovery of any part; but if there are several distinct considerations, some of which are legal and some not, the legal

ones may be recovered. Thus, no one could once recover in Pennsylvania on a note given for a tavern reckoning exceeding twenty shillings, but if other items of account entered into the consideration that were legal, the amount of these could be recovered.

13. The compromise of a criminal charge of a public nature is not a valid consideration for a contract. The reason is clearly one of public policy. Such a compromise ought never to be made, but often is for the sake of recovering a part of the loss. Not infrequently a thief makes such a compromise, agreeing to return a part of the money or the thing he has taken in consideration of starting no prosecution against him. The law, however, is less strict on this subject than it once was, and some of the common law rules have been changed by statute. For example, a note given in settlement of a criminal prosecution for obtaining money or goods by false pretenses is now founded on a lawful consideration, because the settlement is authorized by statute.* By the common law, though, the consideration is not valid. But the promise of a payee of a note not to prosecute the makers for forgery would be illegal and could not be enforced. As forgery is condemned by statute and the crime cannot be compromised, a note founded on a compromise of the unlawful act would be invalid.

* In Pennsylvania.

14. If any work or service is rendered to a person or for him, by his request, this is a good consideration for a promise to pay for it. If no promise is made the law will imply one. In other words, it presumes that he has made such a promise and will not permit him to deny it. The same rule applies to the payment for goods or property of any kind delivered to any one by his request.

15. Again, if A agrees with B to work for him for a specified period, and after working awhile leaves without good cause, can A recover anything for the service rendered? By some courts it has been decided that A can recover what his service is worth, B having a right to set off or deduct the amount of any loss or damage he may have sustained. If A agrees to sell to B 500 barrels of flour at a specified price, and after delivering one-half refuses to deliver any more, B can return the half and pay nothing. But if B chooses to retain the half delivered, or if he has disposed of the flour or lost the barrels and they cannot be returned, he must pay what the flour is worth, deducting the loss occasioned by the non-fulfillment of the contract.

16. No person can make another his debtor against his will by a voluntary offer of work, or money, or goods; but when such an offer is accepted and the work, merchandise, or other thing is retained, the law generally will imply or pre-

sume that it was offered by the other party's request and will imply his promise to pay therefor. Consequently, the law will require the promisor to fulfill his promise, unless it can be shown that the thing was a mere gift.

17. A promise is a good cause or consideration for a promise, and this frequently occurs. For example, a promise to accept goods and pay for them is a good consideration for a promise to deliver them. An illustration of this principle is an agreement by creditors with their debtors, whereby they are to receive a sum or dividend, or other thing, in discharge of their indebtedness. Such agreements are often called compositions. Usually a fixed payment, or several payments, are to be secured to each creditor in proportion to the debtor's assets. In such a case each creditor signs the agreement, and the promise of the one is valid or binding on the others. This principle, that a promise is a good consideration for a promise, has sometimes been applied to subscription papers, the promise of each subscriber forming a good consideration for the promises of the rest. It has been said that as the objection to these promises, or the doubt concerning the liability of the subscribers, is the want of a consideration, it may be remedied by affixing a seal to each name, or by affixing a seal which is declared in the instrument to be the seal of each one.

18. No contract or promise can be enforced by

a person who knew that its performance was wholly impossible. But he cannot defend himself by showing that the performance of his promise was impossible whenever by his own fault, or by his own personal misfortune, this cannot be done. There are, however, promises or contracts which from their very nature must be construed as though the promisor had said, "I will do so and so if I can." For example, if A promises to work for B for one year at twenty dollars a month, and at the end of six months is disabled by sickness, B cannot compel him to fulfill the contract, and A can recover his reward for the time spent in B's service. A mere want of money is not regarded by the law as a legal impossibility.

19. Lastly may be considered contracts in which there is a failure of consideration. If a consideration is given, which at that time is apparently valuable and sufficient, but which proves to be worthless before the contract is properly performed on the other side, the law does not require anything more to be done. If money was paid on such a contract it can be recovered, though without any increase or addition, as a compensation for the other's loss and disappointment. If the consideration has partly failed, but leaving a substantial, though much less valuable, consideration behind, this is a sufficient foundation for requiring the other party to fulfill his promise. He may then be sued on his promise, but is en-

titled by deduction, set-off, or in some other proper way, to an allowance or indemnity for whatever loss he may have suffered in consequence of the partial failure of the consideration. Thus, if B promises to pay money for work that is to be done in a specified way, or as the price of a thing that is to be made for him, and no work is done, or the thing is not made, A cannot enforce the promise for the payment of the money because the consideration has failed. But if the work was done, though not in the specified manner, and accepted by A, he may show that the consideration for his promise has partly failed, and may have a proportionate reduction in the amount that must be paid.

20. Another illustration of the failure of consideration may be given. A agreed to deliver to B some machinery and took notes in payment. A contract was made at the same time that the title to, or ownership of the machinery was to remain in the seller until the notes were paid. Had the machinery been destroyed by fire while in the seller's possession, and before the notes were paid or the title was transferred, the consideration for the notes would have failed. This very thing did happen, and consequently the maker of the notes was not liable for them.

21. One other application of this general principle of consideration may be mentioned. A difference sometimes arises when A undertakes to do

something for B for which A is to be paid a specified price, but in doing so departs materially from B's direction. What are the rights of the parties? This question arises most frequently in building contracts, in which there is often some departure from the original undertaking. If B assents to the alteration it is the same thing as though it were a part of the original contract. He may assent openly, by word or in writing, or by seeing the work done and approving it, or by silence, for silence in such circumstances would generally be equivalent to an approval. But if the change were one that B had a right, either from the nature of the change, or A's language concerning it, to suppose would add nothing to the cost, then no promise to pay an increased price would be inferred from either an express or open approval. Generally, if A does or makes what B did not order or request, B can refuse to accept it, but if he does accept it he must pay for the same. For example, if A should choose to add something to B's house without his request, or make some alteration therein, B may retain it and yet not be liable to pay therefor, and A has no right to take it away unless he can do so without injury to the house. This rule would apply whether the addition or alteration was larger or smaller. It is sometimes provided in building contracts that B shall not pay for any alteration or addition unless it has been previously ordered in writing. If there

is no such provision B would be liable for any alteration he ordered in any way, or voluntarily accepted after it was made. It is also sometimes agreed that for any additions or alterations the same rate shall be paid as for the other work. It may be remarked that the law would imply an agreement of this character if it were not made by the parties themselves.

CHAPTER III.

ASSENT.

1. Parties to a contract must agree to the same thing in the same sense.
2. When the assent must be given.
3. Effect of accepting an offer on a condition.
4. Assent may be inferred from circumstances.
5. Assent is a question of fact.
6. An accepted proposition that is to be put into writing is usually not binding.
7. When assent has been given the contract cannot be altered without another assent.
8. Offers on time.
9. How long may an offer continue?
10. A consideration is not required to sustain an offer.
11. An offer for a fixed time may be recalled.
12. Illustrations of this principle.
13. Illustrations continued.
14. If no time is fixed the law presumes a reasonable time.
15. Offers and replies by correspondence.
16. An illustration of a bargain by correspondence.

1. To make a contract the parties thereto must agree to the same thing in the same sense. If this is not done the contract is not complete. Thus, on one occasion a person offered to another by letter to sell a quantity of "good barley" at a specified price. The other replied, "We accept

your offer, expecting you will give us fine barley and full weight." As the barley was not delivered, the other sued for the injury or loss he had suffered. On the trial of the case the evidence showed that the terms "good" and "fine" were well known in the trade, and meant different qualities of barley, and that there was not an acceptance of the offer of good barley. Consequently nothing could be recovered. Again, a person sent an order to a merchant for a quantity of goods on well-defined terms of credit, and the merchant sent a smaller quantity on a shorter term of credit. The goods were lost by the way, and the sender having sued to recover for the amount, it was decided that he must bear the loss as there was no sale or contract between the parties.

2. Usually the assent must be given at the time of making the offer. A voluntary compliance with the terms of an offer by one who had not previously agreed to them would not render the other liable. In many negotiations an agreement is immediately completed; or if it is not, then both parties understand that the negotiations are at an end. When, therefore, parties assume that their negotiations have come to naught, neither ought to suffer by the announcement of the other that he is executing or fulfilling an agreement not known, or recognized by the other. The law protects persons from thus suffering.

3. Again, if the person who receives a proposition or offer accepts it on any condition or with any change of the terms, even though this be not material, the contract is not complete unless the party who made the offer assents to the modification. For example, if a party offers to buy goods at a named price and specifies the mode of sending them, and the owner accepts the offer and sends the goods as directed, and they are lost on the way, the buyer is the loser, because the goods were his by the sale, which was completed by the acceptance of the offer. But if the seller should accept the offer and in his acceptance make some modification of the terms, and then the goods should be sent and lost, the loss would be the sender's, because the contract of sale was not completed. There are many cases in which the assent of one of the contracting parties was not perfect. Again and again it is contended by one of the parties in a legal controversy that his assent to the proposition was not complete, or not without modification.

4. Sometimes assent may be inferred from circumstances. Thus, if a contract is in writing, it may be good if it is signed by one only, for the assent of the other may be inferred from his possession of the paper and other circumstances. Another illustration may be added, the rules posted in factories for operatives, that are regarded as agreements or contracts with them, and may be

enforced. Of course, an operative in a mill is not bound by them unless it is shown that he knew of them ; but when this is shown, he is as clearly bound as he would have been by putting them into his hand at the time of employing him. Another example may be given. A son was taken sick and the father declared that whoever would take care of him should be well paid. This offer was made known to a person who was then attending him, and who continued his service, and after awhile demanded payment from his father. By thus caring for him he was regarded as accepting the offer. Compliance with a proposition, especially when no notice of acceptance is required, is the most significant evidence of its acceptance. In this case it was not needful on the part of the person who cared for the son to give a notice, either in writing or otherwise, to the father ; the offer was of a kind that could be fulfilled by action, by taking care of the son. This was done by the person who claimed the compensation, and therefore he had a right to recover. There are many cases of this character in which it is not needful to give a formal acceptance, for it can be clearly inferred or proved by circumstances. Nothing could show more clearly the acceptance of such an offer than the performance of the service to which the offer related.

5. These illustrations are sufficient to show the nature of the principle of assent to a contract.

They also clearly show that this is a question of fact that must be determined in each case. Have the parties assented, or come together? In other words, have their minds met and thus completed their negotiation? If they have, then the law regards the assent as complete; otherwise, no contract has been made.

6. Another important principle is that a proposition immediately accepted, but which is to be put into writing, is usually not binding. If the writing is not completed, there is not such an assent or meeting of minds as the law requires. Thus, on one occasion A met B accidentally, and said to him that he could sell coal as cheaply in Cincinnati as at Pittsburgh. B then said he would take a quantity at Cincinnati at a specified price, which was also the Pittsburgh price. A also said he must be paid in cash, and have security for the return of the barges that were to convey the coal. B replied, "Certainly," and prepared a memorandum of the agreement and drew his check to A for the price of the coal. A said, "I will have the papers drawn to-morrow." B called the next day on A, a dispute arose, the agreement was not put in writing and nothing further was done. The contract was regarded as not completed.

7. For the same reason, that when assent has been given to the terms proposed the contract is completed, they cannot be altered without an-

other assent. In other words, when a contract is once made it cannot be altered by the simple act of one party. There must be a second meeting of minds to change its terms. Thus, A agreed by written contract to carry coal for B from one place to another. B afterward wrote to A proposing alterations in the quantities that were to be carried, to which A did not reply. The contract remained unaltered.

8. We shall next describe offers that are made on time. Strictly speaking, every offer is of this character, but in the larger number of transactions the offer and the assent or dissent are nearly at the same time. If one says, "I will send you this thing for a specified price," and the other answers, "I will take it," the assent is complete and the contract is fully formed. But the answer follows the offer and it cannot be actually at the same time. The offer, however, is regarded as continuing until the acceptance, if this is done at once. Though the party addressed pauses a moment or two to think about the offer, still his assent makes a contract, for the offer continues until it is withdrawn. How long though does the offer continue? The answer is a reasonable time, and what this is must depend on the facts in each case. If the party addressed goes away and does not return for several days and then says he will accept the offer, he is too late, unless the proposer assents in his turn. So he would be

probably if he came the next day, or even the next hour.

9. The person making the offer may say how long the offer shall continue. He may say to the other, I will give you an hour, or a day, or a week to make up your mind. Then the person to whom the offer is made knows the duration of the offer. He may avail himself of the specified period for making inquiry, and if, within the time stated, he expresses his assent, the contract is completed as effectually as though he had answered as soon as the offer was made.

10. It has sometimes been said that the person making the offer cannot be bound whenever the assent has been delayed, even though a fixed time was given to the other, because there is no cause or consideration for continuing the offer. But, as an eminent law writer has remarked, if one who makes an offer that is instantly accepted is not bound because there is no consideration, then it might be said that he would not be bound by an answer made within a specified time. No one doubts that an offerer is bound by an immediate acceptance, though he receives no consideration therefor. If this be true, why does not the same principle apply to an acceptance that follows an offer in a second, or a minute or two, or even a longer period, not passing beyond a reasonable time, or a time mentioned by the proposer himself?

11. If, however, an offerer states a specified time for acceptance without a cause or consideration, he may at any time before his offer has been accepted recall it, and he may do this even if he gives no time. And if he makes an offer that is instantly recalled, it cannot be accepted by the other party whatever may have been his intention. But an offer that has been accepted before its withdrawal binds the parties.

12. Two or three illustrations may be given. In one of them a person was appointed an agent of a fire insurance company, with authority to take applications for insurance. An offer for insurance was made to a person, but was not accepted for nearly six months. This was deemed too late. The person to whom the offer was made had delayed far beyond a reasonable period. The court, in answering the question, remarked that an offer cannot become a contract by delay in rejecting or answering it. Undue delay in accepting an offer may be, and should be, treated as a refusal, and the proposer is not bound by a tardy acceptance. A proposal by letter remains a proposal for a reasonable time, and is then regarded as withdrawn. Both parties are interested in its acceptance, and both are expected to attend to the matter with reasonable diligence. In another case B agreed to build a house for A, and then made a contract with C for the materials. As A owed money to B on account of the contract, he

wrote a letter to C, saying, "If B gives you an order on me for the bill of materials, I will accept it and pay it." C took no action concerning the letter for more than two weeks, and then he wrote a reply to A reminding him of the fact that he had sent a letter indicating his willingness to accept an order for the materials he had furnished. At that time A had paid to B the full amount of his indebtedness to him. Two months afterwards B gave C an order on A for the price of the materials. The delay was too great in acting on this order to make A liable for the amount. Surely C had no reason to suppose after such a long delay that A's offer was still open for acceptance. Most offers, as we shall soon see, are for very short periods of time, or for immediate acceptance or refusal, and A. doubtless supposed that, if C did not choose at once to accept his offer to pay the bill for the materials, or to become responsible for them, he expected to look to the buyer for his purchase money. Great confusion would indeed be wrought, if after making an offer of this kind, and delaying two or three weeks, or perhaps longer, an acceptance could be sent binding the person who made the offer.

13. One other illustration may be given. A railroad company desired to buy some land, and the owner stated in a letter that he would sell if his offer was accepted within thirty days. After twenty-five days the railroad company accepted

the terms. The owner then declined to let the company have the land, having made up his mind that it was worth more. He maintained that he had a right to withdraw the offer because nothing had been paid to him for the delay, but the court decided that his offer continued through the specified period unless it was withdrawn. The court did, indeed, say that the letter was without consideration, and therefore did not form a contract, but it was an offer to contract and which was not withdrawn before acceptance. The owner had a right to do this, and had he done so the railroad company could not then have accepted his offer. But after the offer had been accepted the minds of the two parties had met, the contract was complete, and no withdrawal could be made.

14. If the proposer fixes a time, or expresses his intention, then the other party knows exactly what it is. If no definite time is stated, then the inquiry concerning a reasonable time is one of fact that ordinarily must be decided by the jury. In applying this principle to subscriptions, how long is a person bound by a promise contained in a subscription? If no time is fixed and there is no express withdrawal, the court will look into all the circumstances and inquire what the parties actually understood or intended, and endeavor to carry this intention into effect. A subscription that has not taken effect in the lifetime of the subscriber is not a binding contract that can be enforced against his estate.

15. Lastly, we will consider offers and replies by correspondence. Many contracts are made in this manner, either by letter or by telegraph. When a contract is made by correspondence, at what time or by what act is the contract completed? The rule of law may be thus stated. If A writes to B making an offer, this is regarded as continuing until it reaches B and a reasonable time thereafter for accepting it. It may, however, be withdrawn by A at any time before acceptance, but is not withdrawn in law until a notice of withdrawal reaches B. Thus, if A in Philadelphia write to B in New Orleans, offering him a certain price for one hundred bales of cotton and the next day alters his mind, and writes to B withdrawing his offer, and the first letter is received before the second, B has a right to accept the offer and by his acceptance bind A. If B should delay his acceptance until the receipt of the second letter, A's offer would then be effectually withdrawn. It is a sufficient acceptance if B writes to A to this effect and puts his letter into the post office. As soon as the letter leaves the post office, or is beyond the reach of the writer, the acceptance is complete. Offers and acceptances by letter can be withdrawn or set aside by the quicker action of the telegraph. Thus, if A in the case just mentioned, after he has sent his first letter, should telegraph a withdrawal of the offer to B, and it reaches him before the letter

containing the offer, the withdrawal would be effectual. Sometimes the case has been put of an offer sent by letter in a sailing ship, while a withdrawal sent later in a steamer has arrived first. In such a case the withdrawal would be effectual. One can readily imagine cases in which, perhaps, parties who were dishonest would deny receiving first the information sent last, but probably in the most of them it would not be difficult to trace the sending of a telegram, the time it was received at the other place, its delivery, etc., to the party for whom it was intended.

16. An illustration of a bargain by correspondence may be added. It related to the purchase of iron. A wrote to B, "We will take one hundred tons, delivered at a place mentioned as early in the spring as the navigation will admit," and a further quantity at any time between two dates that were mentioned. To this B replied in a few days, "We will have no metal to deliver after the spring freshet, or in case of no freshet in the river in the canal immediately after. Therefore, it will be necessary for you to say what quantity you will take on spring delivery." An immediate answer was requested. In answer to this A wrote that he would take a specified quantity if delivered in a way described, or one hundred and fifty tons if delivered by another mode. To this letter no answer was given, and A tried to recover damages for the non-delivery of the one hundred and

fifty tons. Here was a request for a definite order, but the court decided that the contract was not complete without a further reply from B. The court declared that the last letter did not complete the transaction. It suggested a new proposal and required another communication to complete it. It might not suit B to furnish one hundred and fifty tons in the spring, and no one but himself could say that it would. He had not said so ; he had left A's letter unanswered and the transaction therefore was unfinished.

CHAPTER IV.

WRITTEN CONTRACTS AND THE STATUTE OF FRAUDS.

1. Some contracts must be in writing to comply with the statute of frauds.
2. The more important sections of the statute.
3. A promise by an executor or administrator.
4. A promise to pay the debt of another.
5. When such a promise is not affected by the statute.
6. Agreements not to be performed within a year.
7. Nature of the writing required to satisfy the statute.
8. The sale of goods.
9. Application of the statute to a contract for the manufacture of an article.

1. The law requires that some contracts must be in writing. A statute was passed relating to the subject during the reign of Charles II. (1677), requiring this to be done for the purpose of preventing frauds and perjuries. It was supposed that if the law required a contract to be put in writing and signed by the person who was to pay for the thing purchased, or to do the thing promised, frauds would be less frequent. Yet it has been remarked by those who understand the history of this statute that, however wise may have been the intention of its authors, it has been the means of enabling persons to injure others in the

way of opening a door for not fulfilling contracts honestly made, but which they did not wish to execute. Many a contract has been made in good faith that could not be enforced, because the person who made it did not comply with the law in putting it in writing and obtaining the signature of the other party who was to pay the money, or do some other thing. This statute shows how very slowly the people become acquainted with the laws; for though it was re-enacted in this country in the early times, yet there are many to-day who are not familiar with it, and consequently do not observe it.

2. This statute has probably been enacted in every state in the Union, with some changes. The principal provisions of the English statute, however, re-enacted in this country, and which will be considered here, are the fourth and seventeenth sections. The fourth section provides that no executor or administrator is personally liable on any promise that he may have made; nor is any person liable on a promise for the debt or default of another; nor is any person liable on an agreement made in consideration of marriage; nor can any contract or agreement for the sale of lands or leasing of them that is not to be performed within one year from the time of making it be valid, unless the agreement, or some memorandum or note of it, is in writing and signed by the party who is charged as having made

it, or some other person lawfully authorized by him to sign the same. The seventeenth section provides that no contract for the sale of any goods, wares or merchandise for the sum of fifty dollars, or more, shall be good, unless the buyer has accepted part of the goods thus sold and actually received them, or given something in earnest to bind the bargain or in part payment, or unless there is some note or memorandum in writing of the bargain made and signed by the parties to the contract, or their agents.

3. A few remarks may be made on each clause. The first relates to the promise of an executor or administrator. The duty of these persons, as is well known, is to settle estates. The law does not make them personally liable for any contracts made by them. They may, indeed, make contracts for which the estates they represent are liable, but personally they are free.

4. The next provision relates to promises to pay the debt of another. This provision has often been a difficult one to enforce. A person, of course, is liable on his own promise to pay for whatever he may purchase, but he is not liable to pay for the debt, or default of another, unless there be an agreement in writing, as the statute requires. In such a case, is the promise to pay one's own debt, or to pay the debt of another? One may think that this question can be easily answered, but in truth it is often very difficult

to answer. For example, if two persons go to a shop and one buys and the other, in order to give him credit, promises the seller, "If he does not pay you I will," this is a promise to pay the debt of another, and is void unless it is in writing and signed by the promisor. But if he says, "Let him have the goods, I will be your paymaster," this is an undertaking for himself and the law regards him as the actual buyer and the other only as his servant. Again, if B furnishes goods to C on A's express promise to pay for them, who says to him, "Let C have goods to such an amount and I will pay you," and the credit is given to A, in that case C is not liable for them and A is the immediate debtor. The undertaking is said to be original with him and not a collateral one, and, therefore, it need not be put in writing. Whether a promise is an original one to pay one's own debt, or a collateral promise to pay the debt of another, is a question of fact to be determined in each case. The cases calling for this application of the statute are numerous. The rule is clear enough and no number of cases can possibly determine future ones, as they must always turn on the facts.

5. Whenever the main purpose and object of the promisor is not to be responsible for the debt of another, but to serve some purpose of his own, his promise is not such a one as the statute is intended to reach, although in form it may be

a promise to pay the debt of another. If there be an oral promise to pay the debt of another and also to do some other thing, the latter thing can be enforced at law, but not the promise to pay the debt.

6. Another clause of the fourth section of the statute relates to agreements that may not be performed within a year. This does not apply to agreements which at the time of making them by the parties are understood to be fairly capable of completion within a year regardless of any circumstances, although in fact their execution extends far beyond that period. Another clause relates to the sale of lands, or an interest in them. The language here used is very broad and includes within its scope all leases of real estate for any period no matter how short, but in some states leases having a period not exceeding a year are by statute declared valid, even though they are not in writing. It may also be remarked that it is not always easy to distinguish between an interest in land and a mere lease to use it for some special and temporary purpose; for example, to put hay or grain there, or to leave a wagon or implements, for a license need not be in writing, while an interest in land must be to comply with the statute. With respect to fruits and nursery trees, the courts generally hold that such contracts are not to be regarded as an interest in land, if the parties intend to remove them at once, or within a short period.

7. Next may be considered the nature of the writing required to satisfy the statute. It need not be on a single piece of paper. If there are several letters from which a contract can be formed, these are clearly sufficient for the purpose. Not infrequently a letter, or a series of letters, exist from which a contract can be made out. Whether there must be a consideration in writing or not is a disputed question, some of the courts holding that this must thus appear; others that it may be proved by other evidence. With respect to the signing, this need not be technical or formal. If a party writes his name in the beginning, or in any part of the agreement with that intention, this will be regarded as a sufficient signing to satisfy the statute. Moreover, the signing would be sufficient if printed or written with chalk, or any other material with which writing or printing can be legibly done, as the statute does not specify any particular material that must be used. An agent, of course, can sign for his principal.

8. The seventeenth section relates to the sale of goods, wares or other merchandise. The amount varies from \$30 to \$50 in the statutes of the several states. To comply with this there must be a delivery and acceptance. For example, A meets B and agrees with him for the purchase of one hundred cords of wood for five hundred dollars. B sends the wood immediately to A, but

as the statute requires an acceptance or actual receipt of some part of it, therefore A may return the wood if he desires without any reason, and if there has been no signed written memorandum or actual receipt of some part of it, B cannot recover his money. A delivery is sometimes said to be constructive. For example, the delivery of the key of a building in which property is contained; or if the goods are on storage, the making of an entry by the direction or assent of the purchasers on the books of the warehouseman; or the delivery and receipt of a bill of lading properly indorsed; or the pointing out of the thing if it is difficult of removal. It is said that delivery and acceptance are sufficient if there has been any transfer of possession or control of the property by the seller to which the purchaser has assented, whereby it is intended that it shall pass from the seller's possession into that of the buyer's. With respect to earnest, it may be remarked that part payment may be of any amount which the one party may choose to pay and the other to accept.

9. The contract for the manufacture of an article for a party is not a sale within the meaning of the statute; and whenever the seller is, by the bargain, to manufacture the article sold in a prescribed manner, it is an agreement for the manufacture of goods and not a mere agreement of sale, and need not be in writing. This subject will be more fully considered in another place.

CHAPTER V.

SELLER AND BUYER.

1. To make a sale there must be an agreement by competent parties.
2. Delivery is not essential to constitute a sale.
3. The difference between a sale and an agreement for a future sale.
4. An illustration of this principle.
5. By a sale the property in a thing passes to the buyer.
6. The property in a thing is not changed by unperformed conditions.
7. The law presumes that payment and delivery are to follow a sale, if they do not either party may regard the contract as ended.
8. Or, as alive, and either party may enforce it.
9. The seller has a right to retain the goods until the price is paid.
10. When the seller loses his lien he cannot recover the goods.
11. He can stop them during transit if the buyer becomes insolvent.
12. What the seller can do when the buyer refuses to take the goods.
13. The rule concerning goods sold at public auction.
14. If the seller had no title the true owner can take them.
15. Illustration of this principle.
16. Negotiable paper is an exception.
17. To complete the sale the goods must be identified.

18. Illustration of the principle.
19. A contract for a future sale.
20. There can be no sale of non-existing goods.
21. A purchaser is not required to tell the seller anything affecting the price.
22. Illustration of the principle.
23. Until delivery, what care the teller must take of them.
24. They must be sent as the buyer directs.
25. When the delivery of goods is complete in a store, they are kept at the buyer's risk.
26. A delivery is not completed by a tender of a bill of lading for a larger quantity.
27. What the buyer must do when the goods are defective in quantity, quality, etc.
28. Effect of a clause in a contract providing for mistakes in quality, etc.
29. What the buyer must do when only some of many things are delivered.
30. The same subject.
31. Effect of the denial of the existence of a contract of sale after it has been partly performed.
32. An illegal contract of sale cannot be performed.
33. Effect of fraud in making sales.
34. A buyer may cancel a contract when fraud has been practised on him.
35. And a defrauded seller may sue for the loss he has sustained.
36. What is a waiver of a right to cancel it.
37. On the completion of a sale the buyer has the right to the immediate possession.
38. What is a sufficient delivery.
39. The same subject.
40. Delivery of timber.
41. Delivery of portable articles.
42. When delivery is a fraud to prevent creditors from taking the goods, and what rights are acquired by an innocent purchaser.

43. Sales with a warranty.
44. Illustration of a warranty.
45. What language or conduct is a warranty.
46. A mere representation is not a warranty.
47. The same subject.
48. Effect of statements intended to deceive and have that effect.
49. Nature of an implied warranty.
50. Adulterations.
51. Goods sold by sample.
52. Illustration of the principle.
53. The seller warrants the title.
54. There is an implied warranty of a thing supplied for a special purpose.
55. Is a bill of sale a warranty that the article conforms to the description.
56. The rule concerning provisions.
57. When the buyer can return the goods sold with a warranty.
58. The sale of one's business.

1. To make a sale of goods there must be an agreement by competent parties that their ownership shall pass from the seller to the buyer for a fixed price. If the ownership is transferred, the goods are sold ; if the ownership is not transferred they are not sold. The completion of the sale does not depend on their delivery by the seller, or on the payment of the price by the buyer, but on a change of ownership. By the mutual assent of the parties the buyer immediately acquires the ownership or property, and all the rights and liabilities of property, so that, should any loss or depreciation of the articles purchased occur, the

buyer would be the sufferer. On the other hand, he would be the gainer by any increase in their value.

2. The parties may expressly agree to the giving of a credit that will bind the seller, or this may be inferred or implied from usage or from circumstances. The delivery and acceptance of goods, or the payment of money for them, or a receipt from a seller of what is known as earnest money, are acts from which courts are justified in inferring that a sale has been effected. But neither delivery, or earnest money, or part payment is essential to the completion of a contract of sale. This is the common law, which has been somewhat changed by the statute of frauds, as we have already learned.

3. At the outset, the difference between a sale and an agreement for a future sale must be understood. Every sale is a completed or executed contract, although there may not be payment for, or delivery of the thing purchased. But the contract itself is complete, nothing remains unfinished. An agreement for a future sale is a very different undertaking, although the two are often confused. The difference should be understood, because the rights of the parties in the two cases are very different. An agreement for a future sale is a contract to sell that is to be executed or carried out at a future time, and, therefore, is called an executory contract, in distinction from a contract that is executed or completed.

4. An illustration of an executory contract or agreement to sell a thing may be given. Suppose an agreement is made for the manufacture of a machine. There can be no sale of it, for it is not in existence. The agreement is for the sale of it after its completion. In one of the cases A contracted to sell to B a quantity of leather that was then in vats in the process of tanning. The hides could have been removed at the time of making the contract. They were to be delivered, however, about three months afterwards. It was decided that no immediate property in them passed to the buyer, and that the leather could be taken as the seller's property. This was declared to be so notwithstanding the fact that it had long been the course of business for curriers to purchase leather of tanners while it was in the process of manufacture, which was to be delivered when the tanning was completed, and that advances were frequently made on such purchases. In this case Judge Gibson declared that the agreement for a subsequent delivery was essentially executory. The property in an article made to order passes only by its delivery, because at the time of ordering it there is no property in anything to pass; the accidental existence of a part of the thing at the time does not give the customer a specific right to the whole.

5. A sale is a completed or executed contract. The property, therefore, in the thing sold passes

to the buyer, but when the contract remains executory there is no sale. If actual possession is given to the buyer, the seller's property in the goods is gone with his possession, and also his lien for the purchase money, for the keeping of them is essential to retaining a lien thereon. Furthermore, if a sale is for cash, a part payment will not vest the ownership in the buyer.

6. One's property in a thing is not changed by a sale and delivery on conditions that are to be performed afterwards and which are not; but it is changed when the delivery is absolute and the bargain is perfect, or can be made so by reference to something else. For example, it is certain enough when the price can be obtained by mere computation. Therefore, a sale of a large raft for so much per thousand feet, and delivered to the buyer, changed the property, though the computation was not made.

7. The law presumes that the sale is to be followed immediately by payment and delivery, unless the parties shall otherwise agree. In other words, the law supposes that the seller intended at once to deliver, and the buyer to pay for the goods purchased. If, therefore, the buyer departs without paying or tendering the price, the seller may consider that there has been no sale; and, consequently, if the buyer should come at a later period and offer the price and demand the goods, the seller could refuse to part with them. Or, if

the person to whom the offer of sale is made accepts the offer, but still refuses or neglects to pay the price, and there are no circumstances indicating a credit or justifying the refusal or neglect to pay, the seller may disregard the acceptance of his offer and consider the contract as never having been made. It would, however, be a proper thing for the seller to demand payment of the price before he treated the sale as void, and a refusal to pay for them would then give him at once a right to regard the goods as his own. So, too, if the seller should unreasonably neglect or refuse to deliver the goods sold, the buyer would thereby be justified in supposing that no sale had been made, or that it had been annulled or avoided.

8. Neither party, however, is required to act thus in consequence of the refusal or neglect of the other. As a sale actually has been made, the seller may sue the buyer for the non-payment of the money due to him, or the buyer may sue for the non-delivery of the merchandise. Either party has an election of this nature that he can exercise. He may consider that the contract is ended by the neglect of the other party to do what is required of him, or he may regard the contract as alive and seek to enforce it.

9. The seller has a right to retain possession of the goods sold until the price is paid. This right is called a lien, which means a right to retain possession of them until some charge on them or

some claim is satisfied. Consequently the seller, or any person who has a right of lien, loses it whenever he voluntarily parts with their possession, or by their delivery to another. Furthermore, if a portion is delivered this is regarded as a delivery of the whole, or if a delivery is made of a symbolical character—for example, the delivery of the key of a warehouse in which goods are stored—the right of possession is transferred to the buyer.

10. As the seller, by delivering goods to the buyer, loses his lien, he cannot afterwards retake them and hold them. His title to them is lost by this act. He cannot afterwards claim them should the buyer fail to pay for them as he has promised. He can, though, retain his ownership by agreement. At the time of delivering them, if the buyer agrees that the seller's ownership shall be preserved until he has paid for them, the agreement would be valid and the seller could reclaim his goods *from the buyer* if the price was not paid.

11. While the goods are in the possession of the seller or of his agent, or in transit from him to the buyer, he has a right to refuse or stop their final delivery when the buyer is in failing circumstances. This is an old rule of law, and the reason for it is plain. It is to prevent the seller from loss. Why should he deliver his property to an irresponsible person, or one who is unable to pay for

it? The law does not require him to do such an unreasonable thing.

12. Should the buyer neglect or refuse to take the goods and pay the price within a reasonable time, the seller can recall them, and give notice to the buyer and look to him for the deficiency, if there be any, from the failure on his part to take the goods and pay for them. In making such a resale the seller acts as agent or trustee for the buyer, and his proceedings will be governed by the rules that relate to persons acting in such a capacity. One of these is that he must use due care and diligence, and act in perfect good faith. And, again, the receipt of money after the time for delivery, on account of the contract, will not prevent the seller from recovering for the loss he has sustained. In a case involving this principle, the court remarked that a resale was the usual mode of ascertaining the difference between the contract price and the value of the article when the buyer refused to accept it. But it is not the only mode. The law has no single mode for settling the value of an article in the market at a given time.

13. With respect to goods sold at public auction on credit and which the buyer refuses to take, the owner, before the credit has expired, can maintain an action in his own name against the buyer for not observing his contract. The damages or sum that may be recovered is the difference be-

tween the price that was to be paid and their value at the time of the buyer's refusal to take them. This may be ascertained by a resale at the buyer's risk, but some other mode of estimating the value of the loss may be adopted.

14. If the seller has merely the right of possession, for example, has hired the goods, or has the possession only, as in the case of stolen goods, or has found them, he cannot sell them and give a good title against the owner. The owner, therefore, may recover them from an honest purchaser who was wholly ignorant of the defect in the title of the person from whom he bought them. In other words, only a person who has a right to merchandise can sell it, because the sale must transfer the right of property from the seller to the buyer.

15. Thus, a contract was made with a farmer for the use of a yoke of cattle for one year, at the end of which time they were to be returned. The hirer also had the privilege to pay a price named and keep them. This was regarded as a keeping or bailment of the cattle and not a conditional sale. Consequently, as the cattle were sold during the year by the keeper or bailee without paying the price, the sale did not pass the title to them and the owner could follow and retake them wherever he could find them.

16. There is one exception to this rule, negotiable paper. Whenever this is transferable by

delivery, a purchaser in good faith and for a good consideration acquires a title thereto even though he has bought it of a thief, or of one who has found it. But with respect to all other kinds of property only the owner can part with it, and if a thief or person who has found it should attempt to give a good title, he would fail and the true owner can recover the property. For example, if a horse should stray away from its owner and the finder should sell it and get his money therefor, the true owner would not be prevented from recovering the animal. But if the owner has sold a thing, although he was deceived and induced to do so through fraud, he cannot reclaim it from one who, in good faith, bought it from the person who defrauded him.

17. If anything remains to be done by the seller in relation to the goods sold to ascertain, identify or complete them, the sale is not perfected or executed, and the property or title in the goods does not pass until that thing is done. Thus, D bought of H 300 barrels of oil that were to be delivered "on first water" and paid the purchase money for it. H pointed to a larger quantity of oil at the place of delivery and requested D to select the quantity he had purchased. He went away, however, without selecting or separating the quantity purchased. A flood afterward swept away all of H's oil, and D afterward demanded delivery of the 300 barrels he had purchased, which H refused to

deliver. It was decided that there had been no delivery, that the sale had not been completed, and consequently that no title to the property had passed to D.

18. In the way of further illustration, a purchaser offers a nurseryman a dollar a piece for a hundred out of a row of a thousand trees that are all alike, and the offer is accepted. This is no sale, because any hundred may be delivered, and, therefore, the property or ownership of any specific trees does not pass. But if the purchaser or seller agree that the first hundred in the row shall be taken, or the last hundred, or every tenth tree, or in some way the trees are indicated, then the sale is complete and the trees specified belong to the buyer. The seller can dig them up and deliver them as the buyer's trees, or if they burned by accident an hour after the sale the loss will be the buyer's. So long as they are not specified, even though the buyer has paid for them, they remain the property of the nurseryman, because there is no absolute, complete sale, but only a bargain to select one hundred from the lot and take them up and deliver them. Consequently, if they are destroyed before delivery, the nurseryman must be the loser.

19. A contract for a future sale does not, on the arrival of the time, or happening of the event mentioned, become a sale, transferring the property. The party to whom the sale is to be made

does not then acquire it, and cannot, by tendering the price, acquire a right to the possession; he may tender the price, or do whatever his obligation requires, and then sue the owner for not observing his contract and delivering the machine or other thing forming the subject of the contract, but the property in the article remains in the original owner.

20. For the same reason that the property in the goods must pass by a sale there can be no actual sale of any goods or chattels that have no existence at the time of the contract. Thus, in contracts for a sale of articles that are to be manufactured, as the subject of the contract is not in existence when the parties make their agreement, no property passes until the thing to be manufactured is completed and has been approved and accepted by the person giving the order.

21. A purchaser is not required to make known his knowledge of facts that increase the price when the opportunities for information were equally open to both parties. This principle may be illustrated by referring to a case of historical interest. O was negotiating with G at New Orleans for a quantity of tobacco. He had secretly received intelligence over night of the peace of 1815 between England and the United States, that raised the value of the article from thirty to fifty per cent. He called on G on Sunday morning and asked if there was any news that would in-

crease the price of it. There was no evidence that O asserted or suggested anything to induce a belief that such news did not exist, and the bargain was struck. The court declared that the buyer was not required to communicate intelligence of outside circumstances, open alike to both parties, that might influence the price, though in truth it might be entirely in the possession of only one of them.

22. In another case, A knew that there was a mine on the land of B, of which he was ignorant. Nevertheless, the ignorance of the seller did not render the transaction a fraud on the buyer's part. During the negotiations for the purchase, had the buyer wilfully made any misstatement and misled the seller, and induced him to sell at a lower price than he otherwise would have done, the contract would have been a fraud. In another case, a person bought land on which was a valuable deposit of sand chrome, and the seller tried to escape the consequences of his act and to have his deed of conveyance set aside. The court said that the mere fact that the purchaser knew there was sand chrome on the seller's land, and that the seller himself was ignorant of it, would not affect the validity of the deed. "Every man must bear the loss of a bad bargain legally and honestly made. If not, he could not enjoy in safety the fruits of a good one."

23. Until a delivery has been made the seller is

bound to keep the goods with ordinary care, and is liable for any loss or injury arising from the want of such care or good faith. If this rule is observed he is not liable for any loss or depreciation, unless this arises from some defect that he had warranted did not exist. Thus, A sold to B a quantity of beef, who paid the purchase money. It was agreed between them that the beef should remain in A's possession until it was sent to another place. Sometime afterward B received a part that proved to be bad, and an inspection disclosed the unfitness of any for sale. The court decided that as the beef was good at the time of the sale, the buyer must bear the loss.

24. A buyer who lives at a distance from the seller must send the merchandise in the way directed by the buyer. Should the buyer neglect to give directions, it must be sent in the ordinary way, or as usage has determined. Generally, customary and proper precautions should be taken to prevent loss or injury in transporting it. If this is taken, the goods are sent at the buyer's risk and the seller is not responsible for any loss. But he is responsible should any loss or injury happen in consequence of neglecting to take such care or precaution. If he should send them by his own servants or should carry them himself, they would be in his possession and at his own risk until they were delivered. If the buyer should distinctly indicate the way or means by which he

wished the goods to be sent, for example, by a particular carrier or line, and the seller complied with his direction and exercised ordinary care over them until they were delivered to the agent of the carrier, his responsibility would end with their delivery as completely as though they were put into the hands of the owner.

25. Sometimes goods are sold in a shop or store and put into a parcel, or otherwise made ready for delivery to the buyer in his presence, and he requests the seller to keep them for awhile. In such a case the property in them passes to him, and the seller becomes the bailee or keeper of them for the buyer. Consequently, if they are lost while in the seller's possession, without his fault, the buyer is the loser.

26. A delivery of a fixed quantity of merchandise is not completed by a tender of a bill of lading for a larger quantity. If a party who has promised to pay money tenders more than the whole debt, it is generally valid, but the money must be tendered solely in discharge of the debt. If the object of the tender, besides discharging the debt, is to impose a liability on the creditor, it is not valid. It has ever been held that the tender of a sum exceeding the debt, accompanied with the demand that the creditor shall make the change and return the balance, is in law no tender. When the thing to be tendered or delivered is not money, but a defined quantity of a

specified article, the buyer is under no obligation to receive less or more. There can be no tender of a specific article that does not place the other party in such a position that he has nothing to do except to signify his acceptance in order to have the ownership of it transferred immediately to him. If anything remains to be done, if it is to be separated from a larger mass before it can become the property of the other party, there can be no tender or delivery until after the separation. The ownership of the thing tendered is instantly transferred to the person to whom the tender is made whenever he is under an obligation to receive it.

27. A buyer who knowingly receives goods so deficient or so different from what they should have been that he might have refused them, waives the objection and is liable for the whole price, unless he can show a good reason for not returning them, as in the case of materials that are innocently used before discovering their defects. Thus, a man bought a chandelier that was warranted sufficient to light a room of defined dimensions. He kept it for six months, and then desired to return it and refused to pay for it. The court declared that he had kept it too long, although it was not sufficient for the purpose, and not as good as the warrant specified. Sometimes two or three months, or even a shorter period, is regarded as too long to permit a return of the

thing purchased. How long it may be kept before returning it must depend largely or principally on the nature of the thing and the use that is to be made of it. Though the buyer cannot return it, yet when the price is demanded he may set off the injury he has sustained by reason of the seller's failure to fulfil his promise. The seller, therefore, cannot recover the entire price, only the value of the thing sold to the buyer. But a long delay or silence may imply that the buyer has even waived this right to demand a deduction from the price.

28. In a contract of sale there is sometimes a clause providing that a mistake in the description or a deficiency in the quality or quantity shall not avoid the sale, but only give the buyer a right to make a deduction or to demand compensation. Nevertheless, if the mistake or defect be great and affects materially the availability of the thing for the purpose for which it was bought, the sale is void, because the thing sold is not the thing that the buyer desired and which ought to have been furnished. Of course, it is not easy to determine this mistake or defect, or what must be regarded as a non-compliance with the contract so far as to justify the buyer in refusing to receive the goods. Like many principles of law, while the principle is clear enough, its application must depend on the facts in each case.

29. On some occasions many things are ordered

at one time and by one agreement. In such cases generally the buyer may refuse to receive a part without the rest, but if he accepts any of them that are severed from the rest, the buyer will then be regarded as having given a separate order for each thing, and is required to receive them as they are tendered, unless some distinct reason exists for refusing to receive them. When several things are bought at an auction, by different bids, and especially when the name of the buyer is marked against each thing, its sale is regarded as independent of the others. If, however, several things are bought related to each other, no one of which would have been bought without the others, he would not be obliged to take one or more unless he could have all. The question whether it is one contract, so that the buyer shall not be bound to receive any one thing unless all of them are tendered to him, must be determined by ascertaining from all the facts whether the things belonged together. Should the conclusion be reasonable that no one thing would have been purchased without the others, then they must be taken together, otherwise each thing may be regarded as purchased separately and distinctly from the others. The buyer may have, by the terms of the contract, the right to redeliver the things purchased. For it is often agreed that the purchaser may return the goods purchased within a fixed or reasonable time. He may also have the right to

return them if they prove to have, or not to have certain qualities, or on the happening of a specific event. In such cases the buyer must prove that the circumstances existed that justified him in returning the things purchased. Furthermore, in such cases the property in the things purchased passes at once to the buyer as in ordinary sales, subject to his right to return them, given to him by the agreement. If he does not exercise this right within the agreed time, or within a reasonable time if there be none fixed by agreement, the right to return them is wholly lost; the sale becomes absolute and the price of the goods may be recovered. Again, if during the time the buyer has them in his possession they are so misused as to impair their value, he cannot tender them back, is liable for the price.

30. If a contract for the delivery of lumber, for example, be an entire one, the party who is entitled to it may accept a partial performance and the contractors have a right to recover for the lumber thus delivered. On the other hand, if the remainder is not delivered, the buyer may set off his loss or damage occasioned by the non-fulfillment of it.

31. When two persons enter into a contract, and after it has been partly performed by one of them the other denies its existence and gives notice of his intention to disregard it, the other party may at his option perform it fully and enforce it or con-

sider it at an end and recover for what he has done.

32. As the law does not require any one to do a forbidden thing, no contract can be enforced that is illegal or contrary to law, or that is tainted with illegality. When, however, the illegal can be separated from the legal parts this may be done. We have already remarked that when a consideration is illegal in part and this cannot be separated from the legal part, the entire contract is stamped with illegality. On the other hand, when a consideration is legal and the promise is in part legal and in part not, the legal part may be enforced. Thus, should a person agree for a thousand dollars to sell and deliver a quantity of merchandise and also to assist the buyer in some contemplated fraud, he would be bound to sell and deliver the goods because the consideration was legal and this part of the promise also, but he could not assist in the fraud, because this part of the promise was illegal. In other words, if a consideration or promise is legal in part and illegal in part, and the legal part can be severed from the other, this can be enforced.

33. Fraud vitiates and avoids in law every contract and every transaction. Consequently, an unlawful representation by which a sale is effected, or a purchase of goods with the expectation of not paying for them, or hindering others from bidding at auction by wrongful means, or selling at

auCTION and providing by-bidders to increase the bid, or selling "with all faults" and then purposely concealing and disguising them, will avoid a sale. No title or right passes, and the innocent party, whether buyer or seller, may insist that the fraudulent party shall not take advantage of his own fraud to avoid the sale. Many illustrations could be given of the application of this rule. In one of the cases a man advertised a ship for sale at auction with all faults, but purposely put her in a position where an important fault could not be easily detected. This act avoided the sale.

34. A buyer on whom a fraud is practiced has a right to cancel the sale, but he must do this within a reasonable time after discovering the fraud. The delay must be brief unless he can show a good excuse.

35. On the other hand, a defrauded seller may cancel the sale and sue for the price of the thing sold. If, however, the fraudulent buyer gets the goods on credit and the seller sues for the price of them before the credit expires, this is a confirmation of the sale, including the terms of credit. Consequently he thereby waives the right to cancel the sale, and he has no right to demand the price until the period of credit has wholly expired.

36. Whenever a party who has been defrauded by any contract brings an action to enforce it, this is a waiver of his right to cancel it and a confirmation of the contract. One may inquire, what

then ought to be done in such a case? Plainly, he should sue to recover for the injury he has sustained, but he ought not to recognize the contract itself.

37. When a sale of goods is effected or completed, the buyer has a right to the immediate possession of them as soon as he pays the price. He also has an immediate right to them without payment whenever the sale is on credit. Furthermore, the seller is bound to deliver the goods.

38. What is a proper or sufficient delivery is not always an easy question to answer. In general, it is sufficient whenever the goods are placed in the buyer's hands, or in his actual possession, or whenever action is taken that is equivalent to a transfer of possession. Thus, if goods are landed on a wharf alongside of the ship that brings them, and the buyer is notified, this is a sufficient delivery if it is regarded by usage as equivalent to giving actual possession. Usage is often of the utmost importance in determining the true answer. In general, a delivery is sufficient that puts the goods within the actual reach or power of the buyer, with immediate notice to him so that there is nothing to prevent him from taking actual possession of them.

39. When from the nature or situation of the goods an actual delivery is difficult or impossible, for example, timber floating in a boom slide, such acts as touching it, or going near it and pointing

it out, complete the delivery. Again, if the things sold are at sea, an indorsement and delivery of the bill of lading or other instrument is sufficient to complete the delivery of them. By such an indorsement and delivery of the bill of lading the title or ownership of the goods is immediately transferred to the buyer, and he in turn can transfer them to another by his own indorsement and delivery of the bill of lading. When goods at sea are sold, the seller should send or deliver the bill of lading to the buyer within a reasonable time. A refusal to deliver the bill of lading has sometimes justified the buyer in cancelling the sale.

40. Once a contract was made for the delivery of timber of a particular description that was delivered, but never completely accepted, because it was defective. It was decided that the buyer should have offered to return the timber soon after the deficiency was discovered ; or at least, within a reasonable time after the discovery, should have given notice of his intention of not accepting it. If this is not done, and the timber is carried off by ice or other accident, the seller may recover its value.

41. When portable articles are sold and neither time nor place of delivering them is mentioned, the rule is that they must be delivered at the place where they are at the time of the sale, the store of the merchant, the shop of the manufacturer or

mechanic, or the farm or granary of the farmer where they are kept. When a time for delivering them is fixed by the contract, the seller must seek the buyer at his residence and there tender the articles. If they are heavy or cumbersome the seller must seek the buyer a reasonable time before the day of delivery and ask him to appoint a place for delivering them.

42. This question of delivery is sometimes very important from another point of view. Not unfrequently goods are sold by persons who are on the edge of bankruptcy in order to prevent them from coming into the possession of their creditors, who notwithstanding keep them as though no sale had been made. As goods are usually transferred soon after they are sold, where this is not done, the transaction is generally regarded as a bogus sale for some unlawful purpose like that just mentioned. In such a case, should a third party without knowledge of the sale purchase the same from the seller, he would gain a valid title by acquiring possession of them and could hold them against the other pretended purchaser. Again, unless delivery or possession accompanies the transfer of the right of property, the thing sold may be taken by the creditors of the seller. In other words, while he retains possession of his goods he is regarded ordinarily as the owner, and they may be taken by proper legal proceedings by his creditors. His retention of them may be

explained, and if it is shown to be perfectly consistent with honesty and that good reasons existed for keeping them, and especially if the delay in transferring their possession was brief, the title of the first buyer would be respected and he could acquire them.

43. Next may be considered sales that are made with a warranty. By this is meant a statement of some kind that forms a part of the contract. A warranty may be general, or particular and limited. A general warranty does not extend to defects that are known to the purchaser, or are open to inspection and observation, unless the purchaser at the time is unable to discover them readily and relies rather on the knowledge and warranty of the seller.

44. A contract to deliver iron, for example, made in a particular place, in consideration of a sound price that is paid, is fulfilled by delivering iron made there which the contracting party believed was good, though on trial it proved to be positively bad. The court remarked, in a case of this nature, that the buyer was evidently content at the time of making his contract to take his chances that the iron would be of good or bad quality, providing it were made of metal selected honestly for that purpose from the place mentioned. By way of additional illustration, a sale was made of a number of barrels of lard grease, a part of which was inspected by the purchaser be-

fore making his purchase. He declined to examine more. He received a bill of sale in which the article was invoiced or described as lard grease. There were no false representations, nor was any deceit practiced, nor did the seller know of any defect in its quality, although a portion of it proved to be of an inferior quality. Nothing could be recovered.

45. A warranty may also be either express or implied. It is not implied by the law generally from the fact merely that a full price is paid. The maxim of the law "caveat emptor," let the purchaser beware, prevents this. As a general rule, mere silence on the seller's part is not fraud; but if the usage of trade requires that a declaration of defects should be made whenever they exist, his silence is regarded as a warranty against them. Simple declarations of opinion are not a warranty.

46. A mere representation is not a warranty. The relation between buyer and seller is not a confidential one. If the buyer, instead of requiring an explicit warranty, chooses to rely on the opinion of one who knows no more about the matter than he does himself, he can only blame himself for any loss that he may sustain. In a case in which these principles were applied, a buyer sought to recover for a loss occasioned in the purchase of coal. It was purchased at a price somewhat less than that of first-class coal at that

time. The buyer complained that it contained an unusual percentage of slate and dirt, but the court declared that he got substantially the kind of coal for which he bargained. On another occasion an action was brought on a warranty by the purchaser of some goods that were represented as fit for the China market. He produced a letter from the seller saying that he had goods fit for the China market that he offered to sell cheap. The court, however, declared that such a letter was not a warranty, but merely an invitation to trade, and that it had no specific reference to the goods actually bought by the buyer.

47. In another case it was declared that the purchaser takes the risk of the quality of the article purchased, unless it be warranted, or he is fraudulently misled concerning it. Mere representations of the quality of the article sold do not constitute a warranty. In one of the cases it was remarked that, if mere representations were to be treated as part of the contract, it would not be easy to see why they should not be thus treated in all contracts, and if they were, the law would foster a spirit of litigation by encouraging every man who was disappointed in the advantages expected from a bargain to drown his sorrows by an appeal to the law. The law repairs broken contracts, but it does not attempt to satisfy mere expectations. It is especially important that this should be the rule respecting representations of

the quality of the goods sold, for there is nothing on which both are more apt to differ and less apt to trust each other.

48. If declarations are intended to deceive, and have that effect, the sale may be avoided for fraud, and affirmations of quantity or quality that are made during negotiations for sale, with the view to making a sale, have that effect and will be regarded as a warranty. Thus, in New York, a representation was made by a seller that his flour was superfine, or extra superfine in quality, and worth a shilling more a barrel than common flour. To this statement the seller added another, that the buyer might rely on his representation. This was regarded as a warranty of the quality of the flour. In another case the seller or vendor of a horse said to the buyer, "You may depend that the horse is perfectly quiet and free from vice." This was regarded as an express warranty.

49. In all sales of goods there is an implied warranty that the article delivered shall correspond in kind with the commodity sold, unless there are facts and circumstances to show that the purchaser took on himself the risk of determining not only the quality of the article, but the kind he purchased. Therefore, if a person should sell, and another should buy, an article as blue paint which is thus described in an itemized bill, this would constitute a warranty that the article delivered was blue paint, and not a different article.

50. With respect to an adulteration, if this be only partial, it does not destroy its distinctive character; the buyer is bound by the bargain. In doubtful cases the test seems to be that the article shall be marketable under the name affixed to it by the seller. A case in which this principle was stated related to the sale of teas. It was proved that they had been adulterated, but it was also proved that no teas of the same name or denomination were entirely free from adulteration by an admixture of the same kind of leaves. The court remarked that if a small degree of adulteration were permitted to affect the question of specific character, there would rarely be a binding sale. Wines are constantly adulterated with brandy, and brandy itself passes in the market although often adulterated with alcohol. Drugs, chemicals, paints, dye stuffs, and a countless number of other commodities are constantly purchased by dealers or commissioners while knowing that they are not entirely free from admixture. Adulteration may, however, be carried so far as to destroy the distinctive character of the thing altogether, and in doubtful cases there is, perhaps, no particular test except that of its merchantable character under the name affixed to it. In the case described the teas were resold at prices not greatly reduced to dealers, although they were put on their guard by the buyer's repudiation of the article. The buyer, therefore, was not de-

ceived with respect to the specific character of the teas, however mistaken he may have been concerning their quality.

51. Goods sold by sample are warranted to conform to it in kind and quality, but there is no warranty of the sample itself. It is only a guarantee that the article to be delivered is of the same kind and is merchantable. Thus, there was a sale of five bags of hops with an express warranty that the others were like the samples. The sale was in January, and at that time the samples were essentially like the commodity sold. No defect at that time was perceptible to the buyer. In July, however, every bag had begun to spoil by heating. The seller knew nothing of this fact at the time of the sale. The court decided that there was no implied warranty that the other bags or bulk of the commodity was merchantable at the time of the sale. although the market price was given.

52. In one of the later cases in which this principle was applied, a salesman showed a can of corn to a person, who, after examining it, was asked to prove its quality by cooking it himself. On the following day he made an offer that was accepted by the buyer. There was no fraud and no warranty of the quality, and no facts showing that the parties intended that the quality should be precisely like that contained in the can that was examined and tested. The seller did not

agree or say that the remainder should be of the same quality, and the purchaser did not order cans to be delivered of the same quality as the sample. In truth, nothing was said or done on either side to give character to the sample can as a standard of the quality. It became a standard only of the kind. The court remarked that so long as a commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty. A commodity that is wholly unmarketable is substantially different in kind from one that is not so. In such a case it is not the name merely that governs, but the fact that it is without market value and cannot reasonably be pronounced of the same kind as the sample.

53. The seller of goods actually in his possession as owner is regarded by the law as warranting his own title by the sale. But if they are not in his possession there is no implied warranty of their title.

54. If a thing is ordered for a special purpose and is supplied, there is an implied warranty that it is fit for such a purpose. For example, a wine manufacturer applied to a rope dealer for a crane rope. The seller's foreman went to the buyer's premises to ascertain the kind of rope required. He examined the crane and the old rope and was told for what purpose the new rope was wanted. The seller, however, did not make the

rope himself, but sent the order to a manufacturer who employed a person to make it. It was decided that, as between the parties to the sale, there was an implied warranty that the rope should be fit for the purpose for which it was ordered. The seller therefore was held responsible, not only for the rope, but for the loss from using it, as it broke on the first trial and a pipe of wine was lost.

55. It has been often considered whether a bill of sale describing an article sold is a warranty that the article conforms to the description. The law is not well settled that such a description is a warranty. In one of these cases a bill of sale read thus: "H and Co. bought of T. W. and Co. two cases of indigo, \$272." The article sold was not indigo, but Prussian blue. Fraud was not imputed to the seller, and the article was prepared in such a manner as to deceive exclusive dealers in indigo. The question presented was whether the bill of sale was a warranty that the article sold was indigo, which the court answered in the affirmative. The warranty implied by the bill of sale was the kind of goods. In another case the bill read thus: "Sold E. T. H. two thousand gallons, prime quality, winter oil." The thing sold was oil, and winter oil, but not prime quality. As in the other case, the court determined that the bill of sale constituted a warranty of that quality of oil. In another case, a vessel was advertised for sale as "copper fastened." This was declared

to be a warranty that she was thus fastened as the terms were understood by ship builders and merchants dealing in that kind of property.

56. Finally, it may be remarked that one who sells provisions is always regarded as warranting that they are good and wholesome.

57. If a warranty is defective the buyer cannot return the article sold, unless there be an agreement to that effect, or fraud; he can only sue the warrantor and recover money for the loss incurred. If, however, one orders a thing for a special purpose, known to the seller, he may return it as soon as its unfitness is found out.

58. Another remark may be added, concerning the sale of one's business. In this country not infrequently such a sale is made, the seller agreeing or promising that he will not pursue his trade elsewhere. The contract is void whenever the seller agrees to give up his business and never to resume it again at any time or anywhere, in other language, without any limitation of space or time. And the reason is that it is against public interest to permit a man to cast himself out from his business or trade for the rest of his life. But the contract is valid if the seller agrees for a proper consideration not to resume or carry on that business within a specified time or place. What these limits are have not been clearly defined. They must be reasonable and made in good faith. A contract not to carry on a business in a specified

town, city or state would undoubtedly be good, even if the contract excluded the seller from continuing his business in a considerable section of the country.

CHAPTER VI.

SHIPPER AND CARRIER.

1. Carriers are private or public.
2. His responsibility when carrying for nothing.
3. The lien of a private carrier for his service.
4. The rights and duties of a public carrier.
5. The same subject continued.
6. Who are public carriers.
7. A public carrier may perform other duties.
8. He cannot refuse to carry goods without good reason.
9. The carrier must receive them in a suitable way and at proper times and places.
10. His duty with respect to passengers.
11. To whom he must deliver goods.
12. What is the end of a transit by railroads.
13. What must be done by a carrier when others claim the goods.
14. He has a lien on them for his compensation.
15. His liability for the loss.
16. What is meant by act of God.
17. A carrier is liable for the acts of his agents.
18. His liability beyond his own route.
19. His liability for passengers.
20. He may limit his responsibility by special agreement.
21. His liability for the baggage of passengers.
22. He is liable only for the baggage delivered to him.
23. Limitation of liability for baggage of passengers.

1. The carriage or transportation of goods is a

very important business. Carriers are divided into two classes, private and public. A private carrier is one who carries for another from time to time, but does not pursue this employment as a regular business. The contract between him and the shipper is governed by the ordinary rules of law. He is required to receive, care for and carry the goods in such a manner as he has agreed to do. The bargain may be oral or in writing. He must use ordinary intelligence and care in carrying them; by this the law means such care as a man of ordinary intelligence would take of his own property under similar circumstances. If any loss or injury occurs while the goods are in his charge, arising from a want of care or intelligence, he is responsible. It is said that slight evidence showing a want of care is sufficient to throw on him the burden of accounting for their injury or loss.

2. If goods are carried without any compensation, then a private carrier is known as a gratuitous bailee, and the degree of care that he is required to exercise is very much less. Indeed, the law requires the exercise only of slight care in carrying them. The want of such care would be gross negligence, for which he would be responsible.

3. We have elsewhere spoken of the lien that a seller has on his goods for their payment. An ordinary carrier has a lien on them for his services,

but whether a private carrier has such a lien or not has not been clearly determined. An eminent authority says, that he probably has one. If he incurs expenses concerning the goods for sufficient reason and in good faith, he has a lien thereon for them.

4. Having considered the law concerning a private carrier, the rights and duties and responsibilities of a common or public carrier will be considered. These are very different from the rights and duties of a private carrier, and there are many reasons why they should be.

5. What are the rights and duties of a common carrier? He must take the goods of all persons that are offered to him, and if he is a carrier of passengers also, all who offer or desire to go. He must also take due care and transport them properly and make due delivery. He has a lien on the goods carried by him and also on the baggage of passengers for his compensation. By the common law he is liable for all loss or injury to the goods under his charge, unless it happens from the act of God or from the public enemy. This is the most general rule fixing the liability of a common carrier. It is also the oldest rule and the one most generally understood by all shippers.

6. A common carrier perhaps should be more carefully defined. An eminent authority has said that one is a common carrier "who under-

takes for hire to transport the goods of such as choose to employ him, from place to place." He undertakes the carriage of goods as a business, and this is the principal distinction between him and a private carrier. Truckmen, trainmen, porters, and all who undertake to carry goods for all applicants from one city or town to another, or from one part of a city to another, are regarded as common carriers. So are proprietors of stage-coaches and hackney-coaches. In recent times the business of carrying goods and passengers is largely conducted by railroads and water transportation companies, including canal companies. Ordinary sailing vessels are sometimes said to be common carriers. The boat lines or river canals are common carriers, and so are ferrymen. A steamboat, generally employed as a carrier, may be used for a different purpose, like towing a vessel out of harbor, and when this is done her usual character does not attach to this particular employment. Consequently, if a loss should occur in towing a ship, the owner of the steamboat would be liable only for the negligence of those whom he employed.

7. The same person may be a common carrier and also hold other offices or relations. He may be a warehouseman, a wharfinger, or a forwarding merchant. The peculiar liabilities of a common carrier do not attach to either of these offices or employments. Thus, a warehouseman is liable

only for the loss of goods that are taken to be stored, caused by his own negligence. He is not, like a common carrier, an insurer of the goods. If a carrier receives goods to be stored until he can carry them, or if at the end of the transit he stores them for a time for the safety of the goods or the convenience of the owner, he is only liable as a warehouseman while they are thus stored. But if he puts them into his store or office only for a short time, and for his own convenience, either at the beginning or the end of the transit, they are in his possession as a carrier. As a general rule, wherever the deposit of goods, in whatever place or building, is secondary and subordinate to carrying them, which is the chief thing, the party taking them is a carrier, otherwise he is only some kind of a depositary. If, therefore, goods are delivered to a carrier, or at his depot or receiving room, with directions not to carry them until further orders, he is only a depositary and not a carrier until further orders are received; but when these are given he becomes a carrier, and if they are afterward lost or injured before their removal, he is liable in that capacity.

8. He cannot refuse to receive and carry goods without good reason, for while announcing himself as engaged in this business he makes an offer to the public that becomes a contract with all who accept it. He may demand his compensation, however, and if this is refused he may decline

to carry them ; nor is he required to carry goods if security is offered to him, instead of money. So he may refuse if his means of carriage are already fully employed, or if he cannot carry the goods without danger to himself or to them, or without extraordinary inconvenience, or, again, if they are not such goods as fall within his regular business. He is always entitled to his usual charge, but not to an unusual compensation except for an unusual service.

9. A carrier is bound to receive them in a suitable way and at proper times and places. If he has an office or station, he must have proper persons there, as well as means of security. During the transit and at all stopping places care must be taken of the goods, appropriate to their nature. If he have a notice, regular or otherwise, of the need of peculiar care, as "glass, with great care," or "this side uppermost," he is bound to comply with such directions, unless they impose unnecessary care or labor.

10. If he carry passengers, he must receive all who offer, carry them over the whole route and at a proper speed, demand only a reasonable, or the usual compensation, notify them of any peculiar dangers, treat all alike unless the dangerous condition or misconduct of a passenger requires different attention, and behave towards all with civility and employ competent persons for all duties. Should he fail in any of these particu-

lars, he would be responsible for the injury thereby caused. He is also bound to deliver to each passenger all his baggage at the end of his route, and is held liable should he deliver it to a wrong party, or on a forged order.

11. Furthermore, he must deliver the goods to the sender, or to the person appointed by him, and at the proper time and place. And if a person authorized to receive them declines to do so, the carrier must keep them for the owner. In so doing, however, he is no longer under the strict liability of a carrier, but simply that of a warehouseman. He must also keep them for the owner if he has good reason to believe that the consignee is dishonest and will defraud the owner of them. Concerning the time of their delivery, this must be within the proper hours for business. With respect to the manner and place of delivery, this must depend on the nature of the goods and usage. They should be left, and with such a notice as to secure their early conveyance and safe reception by the owner or consignee. Something also depends on the mode of conveyance. A man may carry a barrel into a house and deliver it to the owner or his servant; a wagon or cart can go to a gate or into a yard and make delivery. A vessel can go to one wharf or another, and must go to the one that is reasonably convenient to the consignee, or to the one mentioned in the agreement. When delivery is not to the owner per-

sonally, or to his agent, immediate notice should be given to the owner. In fact, it may be said that the carrier cannot be made responsible without a notice of delivery to him; on the other hand, he cannot make adequate delivery without a similar notice. Whenever the carrier has a place of delivery, as at a station, the owner must take notice of this; and if the owner has designated how the goods must be delivered to himself, the carrier is bound by it. And if the goods are delivered at an unsuitable or unauthorized place, the delivery will not be good notwithstanding the notice.

12. Railroads terminate at their stations, and though goods may be sent by wagons to the houses or stores of consignees, this is not usually done, as the transit by the carrier is regarded as finished when the goods have reached the carrier's station or terminus. Usually, the consignee of goods sent by a railroad receives a notice from the consignor when to expect them, and this is so common that it is hardly necessary for the agents of the carrier to give notice to the consignee. But this should, we think, be given whenever it is necessary.

13. It may happen that a third party claims the goods under a title opposed to that of the consignor or consignee. If the carrier refuses to deliver them to such a party, and in the end it is proved that the claimant had a legal right to demand them, the carrier would be liable to him.

But the carrier may demand clear evidence of the claimant's title, and if this is not satisfactory, he may demand security and indemnity. If the evidence or the indemnity be withheld, he should not be held liable for not delivering them to him, unless his better title was very clear, or unless the carrier did not act in good faith or with proper discretion. If he delivers the goods to the claimant, the proof by him of a good title is an adequate defense against any action by the consignor or consignee for not delivering them.

14. A carrier has a lien on all the goods he carries for his compensation. While he holds them for this purpose, he is not liable for loss or injury as a common carrier, but only for his own negligence. He may not only hold the goods for his compensation, but may recover this by any of the usual means whereby a lien on property can be enforced. If he carries goods for a party who does not own them, by his request, and at the end of the transit the true owner discovers or interposes and claims them, the carrier may recover his compensation whenever he has rendered a service or benefit to the owner by conveying them. But it would be a personal claim only, for which the carrier would have no lien.*

15. The liability of a common carrier for the loss of goods may be next considered. This is

*2 Parsons on Contracts, 209.

peculiar. It is said to spring from the public nature of his employment, but the true reason is the confidence necessarily imposed in him and the ease with which he may defraud the owner. Another reason is the owner's difficulty to prove the carrier's wrong. The general rule of a carrier's liability is for any loss or injury to goods under his charge unless it was caused by the act of God, or by the public enemy. The act of God means the same thing as unavoidable accident, so the courts have said in some cases. This meaning though is not everywhere accepted. It is asserted that the rule is intended to hold the carrier responsible wherever he causes the loss, either by negligence or design. Consequently, the act of God means some act in which neither the carrier himself nor any other man had any direct and immediate agency. If, for example, a house containing goods is struck by lightning, or is blown down by a tempest, or washed away, this is an act of God for which the carrier is not liable. No man could have directly caused the loss. As a general rule a common carrier is always liable for a loss by fire unless it was caused by lightning, and this rule has been applied to steam roads. It might be true that after the lightning, tempest or inundation the carrier was negligent and lost the goods which could have been saved by proper efforts, or that he took the opportunity to steal them. If this were shown, the carrier would, of

course, be liable, but the law will not presume this, if the main cause were one of which the carrier could not have been guilty. So a carrier would be liable for a loss caused by robbery, however sudden, unexpected and irresistible.

16. The act of God may be negative merely. For example, the wrecking of a vessel from a failure of wind. It includes also any loss springing from the inherent nature of the thing, like fermentation or decay, assuming, of course, that the carrier has taken proper precaution to prevent it.

17. The general principle of agency extends to common carriers and makes them liable for the acts of their agents that are done while discharging their agency or employment. So too, the knowledge of a carrier's agent is his knowledge, if the agent was authorized expressly or by the nature of his employment to receive or possess such knowledge. But an agent for a carrier may act for himself, a coachman may carry parcels for which he is paid personally and does not account to his employer. In such a case he is not liable unless the owner of the goods supposed the coachman carried them for his employer and was justified by his conduct in thus believing.

18. Carriers may be liable beyond their own route. It is a very common thing for them to share the profits arising from the transportation of merchandise over their several routes; and once

when they were thus united in carrying over a continuous line, they were liable for the loss arising on any part of it. It was also said that if they were not thus united in fact, but seemed to be so, and justified the sender in supposing that they were, they were equally liable. But now, if a carrier takes goods and promises to transport them to the end of his line and then to forward them by another carrier, he is liable as a carrier to the end of his own route, and also if he neglects to fulfill his promise to deliver them to the next carrier; but after he has thus fulfilled his promise he is not liable for what may happen afterward. And this is the usual practice at the present time of transportation companies composing joint lines. The first carrier agrees to be responsible for loss over his own route and to make a delivery to the next carrier, and so on until the transit is completed.

19. A carrier of passengers is under a more limited liability than a carrier of goods. The reason is that he has not the same control over them that he has over goods. Nevertheless, the liability of a carrier for passengers is very great. No proof of care will excuse a carrier if he loses goods intrusted to him for transportation, but proof of the utmost care will excuse him for an injury happening to passengers. A carrier of passengers is liable for any injury to them unless he can show that he took all possible care in carrying them.

20. A carrier, however, may limit his responsibility for carrying goods by special agreement. Once it was affirmed that this could not be done. It was contended that he was an insurer of their safety, and that it was contrary to the policy of the law to lessen this liability by any agreement whatever. This ancient rule has long since been modified, and by the modern rule a carrier can relieve himself from all responsibility for the loss of goods not arising from his own neglect. Indeed, the courts on several occasions have declared that a carrier, by agreement, could relieve himself even from loss by negligence; but they have retreated from this position on the ground that it was contrary to public policy to relieve a carrier from negligence on any occasion, or for any reason. Carriers are permitted to make special contracts relieving themselves from liability as insurers, for the reason that goods are carried at a lower figure than they would otherwise be. The tendency of compensation for carrying is constantly downward, but one of the considerations is that the shipper will become his own insurer, or, in other words, will assume the risk of loss arising from fire or from negligence. He often insures his goods in insurance companies doing that business, and thus protects himself against the risk of loss that was once undertaken or borne by the carrier. The making of such agreements is universal, and some of the courts recently have returned to the ex-

treme ground that it is proper enough for a carrier to relieve himself by agreement from all risks, whether arising from his own negligence or otherwise, whenever the other party receives an adequate consideration for undertaking or assuming the risk himself; and we are inclined to believe that this extension of the authority of a carrier to relieve himself from negligence will be adopted. And if a shipper can get his goods carried for less than the usual rates whenever willing to assume all the risks of transporting them, why, if he desires, should he not be permitted to make a contract of this character?

21. A carrier of passengers is responsible for their baggage, though only to the extent of what is fairly and ordinarily carried. What this quantity may be must always remain an open question of fact to be determined in the same manner as any other question of fact. There can be no precise and definite standard. A traveller on a long journey needs more baggage than one on a short journey, and a traveller to some places and for some purposes needs more baggage than for other places or for other purposes. The reason for the rule is to prevent a carrier from becoming liable by the fraud of a passenger, for this would be the case if he could carry merchandise as baggage and thus make a carrier of passengers a carrier of goods without knowing it. Generally a carrier of passengers by rail, steam or stage carries the

baggage of a passenger without receiving specific payment for the service. But the law considers a payment for this so far included in the payment of fare as to form a sufficient ground for the carrier's liability.

22. A carrier is only liable for goods or baggage delivered to him and placed under his care. Consequently, should the sender of goods entrust them with his own servant and not to a carrier, the carrier would not be responsible. Again, whenever a passenger keeps his baggage, or any part of it, in his own hands, or within his own control, instead of delivering it to the carrier, or his servant, the carrier is not liable in that capacity for any loss or injury that may happen.

23. Not infrequently carriers have a rule prescribing the maximum loss on baggage for which they will be responsible. By this rule it is generally declared that for a trunk, valise or other article lost they will not be responsible for more than a fixed amount, unless the owner shall give notice of its contents at the time of delivering the same. In some cases it is held that these notices thus fixing the amount of their liability are not binding on passengers, and they surely are not whenever passengers do not know of them. On the other hand, whenever they are known, why should passengers not be bound by such limitations? Surely they are reasonable, and the courts on many occasions have enforced them.

CHAPTER VII.

PRINCIPAL AND AGENT.

1. The relation of principal and agent.
2. A person can act as agent who cannot act for himself.
3. Agents are general or special.
4. In what ways authority may be given to agents.
5. Effect of repeating acts.
6. An agency may be established by adopting and ratifying his acts.
7. An illustration of this principle.
8. An agency may be established without disclosing the principal's name.
9. Description of the kind of agents.
10. Authority and duties of a cashier.
11. Agents of other corporations.
12. The authority of a general agent to make contracts.
13. Illustrations.
14. The authority of a special agent must be strictly followed.
15. Illustrations.
16. General authority must be properly exercised.
17. Authority of joint agents.
18. Effect of usage.
19. Authority to sell implies an authority to sell on credit.
20. When authority to sell contains authority to warrant.
21. Authority to sell does not confer authority to collect.
22. Authority to receive payment.
23. Authority to collect does not contain authority to receive a note.

24. Authority to settle a claim does not contain authority to give a discharge for nothing.
25. What a principal may do when his agent sells goods without authority.
26. An agent cannot buy his principal's property.
27. An agent cannot appoint a sub-agent.
28. A principal may revoke his authority.
29. When a general authority may continue after revocation.
30. Neither can dissolve the relation in an unfair manner.
31. The degree of care that an agent must use concerning his principal's affairs.
32. An agent should keep an account of his doings.
33. Knowledge acquired by an agent relating to his business affects his principal.
34. How far does a notice to an agent affect his principal?
35. The liability of a principal for his agent's fraudulent representations.
36. The same subject.
37. He is not responsible for his agent's criminal acts.
38. The wrongful act of a corporation's officers may be visited on it.
39. Unnecessary delay in repudiating a transaction is an acceptance of it.
40. Every agent is entitled to indemnity when he obeys orders.
41. If he wrongfully takes his employer's property he may recover it.
42. When is a principal responsible for the acts of his agent?
43. The effect of exceeding authority in purchasing goods.
44. An agent is responsible to his principal for a loss arising from neglect of duty.
45. Consequences of neglect in collecting commercial paper.
46. Various ways and acts by which an agent becomes liable.

47. A person cannot hold an agent liable if he knew he exceeded his authority.

1. Having described some of the general principles relating to contracts, the way is prepared for describing the principles which apply to persons in special relations, and the first of these is that of principal and agent. One of the peculiarities of modern business is the transaction of so much in a representative manner.

2. What, then, are some of the principles governing the relations of this important class of persons to their principals? And first we may remark that a person who is disqualified from making a contract on his own account can sometimes act for another. Thus, a person under age, or a married woman, or an alien, may act as an agent, even though he or she is incapable of acting in any other manner.

3. Agents are of two kinds, general and special. A general agent is authorized to represent his principal in all of his business, or in all of a particular kind; a special agent is authorized to do only a specific thing, or a few specific things.

4. Authority may be given to agents in several ways. One of the ordinary modes is by writing and often under seal. This is called a power of attorney. In many cases an agent acts only by oral authority. An agent may be thus appointed, possessing authority to make a written contract, but he cannot execute one under seal. To make

a sealed contract he must be authorized by an instrument containing similar authority. In other words, to execute a sealed instrument he must also be appointed by an instrument under seal.

5. Whoever deals with a person who is repeatedly employed to do specific things, for example, to sign bills or receipts, or policies or to make purchases, is justified in believing him authorized to do these acts with the consent and approval of his employer. If, however, an agent is usually employed to buy, but always for cash, this does not imply an authority to buy on credit. On one occasion a note was signed by T., the son of a member of a firm. He was their book-keeper and manager at the time of signing the note. It was not customary for clerks to give notes, though T. had done so in some cases. He was regarded as having authority to sign the note in controversy. In this case the court remarked that a single act by a servant, without disapproval, has justified a person concerned therein in trusting him afterward. A principal is bound by the act of an agent no further than he is authorized to bind him, but the extent of an agent's power is ascertained from facts as well as words. The law has regard to the public authority, and the rule often is that he who trusts must pay. In the case under consideration the clerk was an authorized agent for many purposes. Whether he had authority to make the note or not was a question of fact for the jury to decide.

6. An agent's acts may become valid by adopting and ratifying them. The ratifying of a contract necessarily implies the relation of principal and agent, for if it did not, ratification could not occur. By so doing his authority relates back to the beginning of it; and a corporation like an individual is bound by ratifying an agent's acts. But no ratification is effective to bind a principal unless it was made by him knowing all the material facts. If part of them are withheld from him, or are unknown, then his ratification is not complete, for the law does not presume that he will ratify the acts of his agent in the dark. Generally, one who receives and holds the beneficial result of the act of another performed as his agent is not permitted to deny such agency.

7. Thus, should an agent sell under seal the property of a supposed principal, and receive payment and hand this over to him, he might avoid the sale and recover the property if he could show that the agent had no authority to sell it; but the principal could not do this and also hold the money. In other words, he cannot deny the acts of his agent and still retain the fruits of the transaction. If he repudiates his agent he must also repudiate his acts; and if one, knowing that another has acted as his agent, does not disavow his authority as soon as he can, and permits a person to deal with the supposed agent, his conduct is regarded as an adoption or confirmation of

his acts. Nor can a supposed principal adopt a part of his agent's act and reject the rest. He must adopt the whole or none. And if an agent should sell his principal's property and his act was ratified, he would thereby ratify the agent's representations concerning the sale.

8. An unknown principal may show that one of the contracting parties was actually his agent. He may thus make himself a party to the contract, but if the other contracting party has acted in good faith with the supposed agent, or paid him anything in cash or otherwise, he will not be the loser by the principal's conduct. In other words, so long as a principal remains unknown he cannot make a party contracting with his supposed agent suffer by reason of his own conduct. This would be contrary to all reason. There are many cases of this kind in which a principal, for some reason or other, prefers not to be known in transactions, and another person is employed to act for him. If a principal chooses to act in this manner, he may do so, but surely the other contracting party ought not to suffer in consequence of the principal's mode of doing business. Again, when an undisclosed principal is discovered, he may be liable on his contract. Again, if one sells to an agent knowing that he is thus acting, and also for whom, and he chooses to charge the goods to the agent alone, he cannot afterwards transfer the charge to the principal.

9. There are many kinds of agents, but these need not be described. Among the most widely known are factors and brokers, between whom there is a well defined difference. A factor is a mercantile agent who sells and purchases and has possession of the goods; a broker is an agent of this character not having possession of them. Consequently, a factor may act for his principal and yet in his own name, because the actual owner gives to him the appearance of an owner by delivering to him the goods, while a broker can act only in his principal's name. A purchaser of goods from a factor may set-off against the price a debt due from him, unless he knows that they belong to another. But one who purchases goods from a broker cannot do this. Furthermore, a factor has a lien or claim on the goods for the indebtedness of his principal to him, while a broker generally has not.

10. A cashier is another illustration of a general agent possessing all the authority necessary or usual for the transaction of his business. He cannot, however, bind his employer by an unusual or illegal contract. In one of the cases the court declared that a cashier was allowed to present himself to the public as habitually accustomed to pay bills or notes of his bank, also to pay notes discounted by the directors, to receive payment of debts due the bank, to receive money on deposit and to pay the same to the order of the

depositors. He is regarded as having its books, notes and other property, and as keeping its accounts and other records. In many banks these duties are performed in part by tellers, clerks, or assistants, but he might at any time perform them if he desired. As he is a general agent, he can bind his bank while acting within the scope of his authority, though violating his instructions.

11. The same description, with some qualifications, might apply to the agents of other companies or corporations. Their acts bind their employers or companies so far as they have authorized them, or justified persons who deal with them in believing that they possess the authority exercised by them, or are acting within the general scope of their authority.

12. The authority of a general agent to contract is limited to the usual manner and means of accomplishing the business entrusted to him. Persons who deal with an agent carrying on a general business, for example, a general manager of a business, are not bound to inquire into the particulars of his authority. A person intrusted with the general management of a trade or business has an implied general authority from his employer to make such contracts as are usual and necessary in the ordinary conduct and management of the business. A foreman, for example, of a saw mill who took an order for a large quantity of lumber and agreed to have it ready for

delivery within a particular period, bound his principal thereby, although no particular authority from him was shown authorizing the agent to make the contract.

13. Furthermore, a general power implies whatever may be necessary to its complete execution. For example, a general agent to make sales is competent to rescind a contract of sale with the consent of the other party. One who is employed by another to act for him in the usual trade or business of an agent, as auctioneer, broker or the like, thereby acquires authority to do all that is necessary or usual in that business. Again, if a person puts his goods into the possession of another whose ordinary and usual business is to sell goods, he authorizes the whole world to believe that he has them for sale, and any buyer could hold them.

14. On the other hand, an agent who is authorized to do a specific thing and exceeds his authority, does not bind his principal, because the party dealing with him must inquire for himself into the extent of a special agent's authority. The distinction, therefore, between the authority of a special and general agent is very important. In the one case a principal is bound by all acts performed by his agent within the natural and usual scope of the business, while in the other case a person who is doing business with an agent must examine into his authority and cannot

hold his principal for any acts that exceed it. Of course, secret limitations are not binding on persons who are not acquainted with them.

15. Some illustrations may be given. An attorney who is authorized to convey a tract of land for his principal after he has purchased it from a sale, cannot agree to convey it before purchasing it, and should he do so would not properly execute his authority, and the purchaser would acquire no title. Again, an agent who is specially employed to receive payment in money cannot vary his authority by receiving a note.

16. Generally, an authority must be exercised with great strictness, otherwise the principal will not be bound, although his agent may be. When an agent's authority is in writing, the instrument itself may be considered to ascertain the intention of the parties, and the extent of his authority.

17. A power that is given to two cannot be executed by one. An exception, however, to this rule exists in the case of a joint power exercised by public agencies. Thus, either of two factors, whether partners or not, may sell goods consigned to both ; and when they are joint agents, whether partners or not, notice to one is notice to both.

18. In commercial matters usage may sometimes add to an agent's authority so far as may be required for the discharge of his duty in the most complete manner. Thus, an agent having

authority to discount a bill may indorse it in the name of his principal, unless he is expressly forbidden to indorse it. A broker also who is employed to procure insurance may adjust a loss.

19. An authority to sell implies an authority to sell on credit, if this be usual. Otherwise, it does not. And if an agent sells on credit without any authority, or in excess of it, the principal may claim his goods from the purchaser, or regard the agent as responsible for the amount. An auctioneer or broker has no right to sell on credit unless authority is given to him expressly, or by usage. Furthermore, an agent is generally responsible if he mixes the goods of his principal with his own in such a manner as to confuse them. He is also responsible whenever he takes a note payable to himself, unless this is authorized by the usage of trade. But if he should take a note thus payable to himself and become bankrupt, it would belong to his principal.

20. Authority to sell contains also authority to warrant whenever the usage exists of making sales with a warranty. And also when the want of authority to warrant is unknown to the purchaser without his fault. For example, an authority to sell a horse implies an authority to warrant the animal, because horses are usually sold in this manner. A general authority to sell also confers an authority to sell by sample, but a general authority to transact business, or even to receive

and pay debts, does not authorize an agent to accept or indorse bills or notes that will involve his principal. Indeed, authority to indorse is construed strictly, but such authority may be implied from the previous usage of an agent known and sanctioned by the principal. Thus, a confidential clerk was accustomed to draw bills for his employer, who authorized him on one occasion to indorse, and on two other occasions to receive money, by indorsing his employer's name. The court declared that a jury might regard the clerk as authorized generally to indorse for his employer. This is an extension of a clerk's authority on very slight evidence. But, of course, if his acts were confirmed by his principal, he would be liable for them.

21. Authority to sell on credit does not authorize an agent to collect money in the name of his principal. And if a purchaser should pay him, he would not be protected and discharged simply by proving the agent's authority to make sales. But an agent to whom merchandise has been intrusted with authority to sell and deliver is authorized to receive the price. Otherwise, the fraud on the purchaser, so the courts have remarked, would run into criminality.

22. The payment of money to an agent only binds his principal when it is done in the regular course of business. And payment to a sub-agent, whose appointment was not authorized by

the principal, renders the agent liable to his principal for any loss of money received by the sub-agent. Thus, a legacy left to a tradesman which was paid by the executors to one of his clerks who received payments daily, was not a sufficient payment to discharge them. A general agent who is authorized to receive money at the counter, or any person who is authorized to receive it at any particular place, or in any particular way, has no authority for receiving it in any other place or way. Nor would a principal be bound if an agent, who was authorized to receive money, should discharge a debt without receiving it, and give a receipt therefor.

23. An agent having authority only to collect a debt has no right to take a note for the amount from the debtor to himself and thus substitute himself as creditor. But the ratifying of such an arrangement by the principal, would bind him, and the debtor would be released from liability to the principal on the original claim. An agent employed to receive payment in money cannot vary his authority by receiving a bill. And surely an agent cannot, without particular authority, commute a payment by receiving anything, a horse, for example, in discharge of the debt. If, however, the article is delivered to the principal, or he agrees to it, he will be bound.

24. Again, an agent having authority to settle a claim against a carrier for the loss of goods can-

not give a discharge without receiving a consideration. A mere agreement to receive other goods in place of those lost would not release the carrier from liability. In a case in which this principle was decided the court remarked that a letter of attorney authorizing an agent to collect a debt would not empower him to give a discharge on the receipt of the debtor's note. Still less would a clerk be authorized to release a liability for a claim without receiving any consideration whatever.

25. Nor can an agent intrusted with goods sell them without authority; should he do so the principal could affirm the sale and sue the buyer for the price, or disaffirm the sale and recover the goods from the buyer.

26. An agent who is employed to sell property cannot buy it himself unless he is expressly authorized to do so, nor can a trustee purchase property held in trust for another. But, of course, a principal may ratify and confirm a sale or purchase by his agent by accepting the proceeds and delaying to make objection after the wrongful act is made known to him. Again, should a trustee or agent to sell property, buy it not in his own name, but through some one else, the sale would be void.

27. An agent cannot appoint a sub-agent unless he is authorized to do so expressly, or by usage, or by the obvious reason and necessity of the case. Thus, a consignee or factor for the sale of merchan-

dise may employ a broker to sell when this is the usual course of business. A sub-agent appointed without such authority is only the agent's agent, and not the principal's. The principal, however, may authorize or confirm or ratify the sub-agent's act, and when he does, the act becomes that of the principal.

28. A principal, unless his agent is personally interested in the business, may at any time revoke his authority to his agent. His death operates in this manner. But an agent's death does not revoke the authority of a sub-agent appointed by the agent under an authority given to him by the principal. If an agent has an interest as well as authority, for example, when one gives a person authority to sell goods and apply the money for his own benefit, and the execution of authority is needful to make the interest valuable, it cannot be revoked by the principal's pleasure.

29. A general authority may continue to bind a principal after it has been revoked, if the agency was known and the revocation was wholly unknown to the party dealing with him without his fault.

30. As a principal may revoke his agency, so may an agent withdraw at pleasure; there is, however, a limitation on both sides; neither can exercise this power in an unfair, injurious manner that circumstances will not justify. If, there-

fore, an agency ceases in such a way that the other party is injured, damages may be recovered.

31. An agent is bound in his principal's affairs to use all the care and skill that a reasonable man would use in his own. He must also act in good faith. He cannot make a profit from his principal for whom he has undertaken to act. When, however, an agent acts gratuitously, or no legal right to compensation springs from his services, he will be responsible for no other negligence than that of a gross character. Even though receiving no compensation for his services, he will be responsible for gross negligence concerning the property intrusted to him. The varying degrees of negligence have often been the subject of judicial controversy, and it is by no means easy to distinguish between them. The shades are almost imperceptible and, therefore, nothing besides the general principle can be said in the way of determining the legality of the acts of an agent in any particular case. It must be left for the consideration of a jury to determine whether the negligence is of a kind for which he is responsible.

32. An agent should keep an exact account of his doings, especially of his pecuniary transactions. After a reasonable time has elapsed a court will presume that his account has been rendered, accepted and settled. Otherwise, every agent might remain liable on his account. Again, he is liable not only for the balance in his hands, but for interest when any has accrued.

33. An agent represents his principal in receiving information affecting his business. Therefore, knowledge acquired by an agent in the course of his business is regarded as knowledge of his principal. It is supposed that he will inform his principal of everything that will be useful to him in any way, and if he does not, nevertheless his principal is regarded as having gained the information from him, because he is acting for him; he is his principal's servant, and the law supposes that he is doing his duty. At all events, if he is not doing so, of two innocent persons who must suffer, his principal, who has appointed him, should be the loser through any failure of duty on the part of his appointee or agent.

34. The law concerning notice or information to an agent has a very wide application. Notice to an officer or member of a corporation is regarded as notice to the corporation, whenever, either by appointment or usage, he had authority to receive a notice. It is not true, however, that in all cases notice to a member of a corporation is notice to the corporation; and many cases have occurred in which the question has arisen whether or not the officer held such a relation to the corporation that information to him should be regarded as a notice to the corporation itself. Thus, information to the cashier of a bank concerning the protest of a note, for example, would unquestionably be considered as notice to the institution; but

if the information was conveyed to a director, it would not be considered as notice to the institution, for the reason that it is not within his province or duty to attend to such matters. Many questions of this kind arise in business concerning notice. The tendency of the law is not to widen the province or duty of officers to convey information to the institutions with which they are connected, and the reason is a very sound one, their duties may become too burdensome. There is a pretty clear line between advisory officers and those whose duties are of an active character. The general officers of an institution, those who are employed in its actual management, are clearly held accountable for all information touching the business of the institution they represent, and information conveyed to them is regarded, and properly so, as information conveyed to the institution itself.

35. If an agent makes a fraudulent representation, his principal is liable, although he was personally ignorant and innocent of the wrong. Nor can he retain any benefit from such an act. And whenever he does retain it, he cannot disavow the representation and shield himself behind the plea that the person was not acting for him. In other words, by retaining the fruit of his agent's act he becomes responsible for the act itself.

36. And if an agent in selling makes a material representation which he believes is true and the

principal knows is false and does not correct, the fraud is the principal's and avoids the sale.

37. Though a principal may be responsible for the deliberate fraud of his agent in executing his employment, he is not responsible for his criminal acts, unless he expressly commanded them. Sometimes, however, when a principal has intrusted property to his agent, who has used it illegally, the principal himself may be liable criminally without proof of directly participating in the act; for example, in the smuggling of goods.

38. Once it was considered that an agent of a corporation who did a criminal thing was, indeed, responsible therefor, but not the corporation itself, because it was not capable of doing an immoral thing. Its nature was peculiar; it was not endowed with a moral quality. It could not, therefore, be regarded as responsible for acts of this nature. But the law has long since seen the necessity of regarding a corporation in a different light, and the wrongful acts of its officers are often visited on the institution itself. For example, an officer of a bank has no right to lend more money to a customer than the law prescribes, or to take security that is forbidden; nevertheless if the bank receives the benefit of his act, it is punishable therefor, and the good of society requires that this should be done. Consequently, for all acts of this character that are done with the intention of benefiting the institution, although they are not

within the legal scope of an officer's authority, the institution itself is responsible.

39. An unnecessary delay in repudiating a transaction is an acceptance of it. For example, the principal of an agent, who has bought goods for his principal without authority, may repudiate the purchase and yet hold the goods as security for his money if there has been an advance on them.

40. Every agent is entitled to indemnity from his principal when he acts in obedience to lawful orders, or when he does an act that is not wrong in itself which he is induced by his principal to regard as right at that time.

41. The principal of an agent who embezzles, or wrongfully takes his employer's goods, may recover or reclaim them if they can be traced and identified. But if they should become blended with the agent's own goods and he should die, or become insolvent, the principal could claim only as a common creditor.

42. When is a principal responsible for the acts of his agent? In other words, when is a person to be regarded as acting in a representative character? Not only when such authority has been actually given to him, but also when a principal by words or acts has permitted a person with whom his agent deals to believe that he is clothed with this authority. A man is responsible as a principal who, in some way, has led all persons to

believe that he has constituted or appointed some other man to act as his agent, or has led one or more parties to believe this.

43. Whenever an agent exceeds his authority and purchases more goods or of a different kind and character than he was authorized to purchase, his principal is not responsible for them unless he ratifies what has been done. And if goods are purchased through fraud and in the principal's name as a means for deceiving creditors, they may be taken and sold for the agent's debts. But the principal by affirming his agent's acts may make the goods his own in despite of his agent.

44. An agent cannot disregard the instructions of his principal without making himself liable to him for the consequences. In ascertaining or defining the extent of his instructions, custom or usage will often have a great influence, because on the one hand an agent is entitled to all the advantages usage would give him, and on the other, a principal has a right to expect that his agent will conduct himself in harmony with the usages of his business. But usage will never prevail over express instructions. A principal who accepts the benefit of an act performed by his agent beyond his instructions relieves his agent from responsibility therefor.

45. Whenever an agent to whom commercial paper is sent for collection is negligent or mistaken in transacting the business, the measure of

his responsibility is the loss actually sustained by his principal. If a bank receives notes or bills for collection, though charging no commission, the possible use of the money is a sufficient consideration to make it liable as an agent for any want of diligence in transacting the business. But if a bank exercises proper intelligence in selecting a collecting agent to do whatever may be necessary in relation to the collection, it is not liable for his want of diligence and ability. This is the rule in most states, but not in all of them. In New York, for example, a bank to which paper is sent for collection is responsible for the negligence of a sub-agent to which it may be sent. A similar rule has been established by the Supreme Court of the United States. By this rule the bank that first receives a collection is held responsible for the negligence of all persons or institutions that may be employed in completing the collection.

46. Generally, an agent may make himself liable by his agreement, or by going beyond his authority, or by going differently, or by concealing his character as an agent, or by his own bad faith. If he describes himself as agent for some unnamed principal, he is not liable, unless he is proved to be the real principal. If an agent should execute an instrument containing such knowledge as would hold him personally, he cannot clear himself by showing that in fact he signed

it as agent, which was known to the other party. The reason is that this would vary the terms of a written contract by oral evidence, which the law will not permit to be done except in cases of fraud, accident or mistake. To permit this generally would destroy the certainty of written contracts, and the law, therefore, wisely observes a strict rule with respect to its introduction.

47. If an agent exceeds or disregards his authority, and this is known by a person who is dealing with him, he cannot hold him personally liable. But if this is not known, the agent is liable on the whole contract, although he may have authority to execute or perform a part of it. A person who has no authority and acts as agent is personally responsible. But if an agent should exceed his authority ignorantly he would not be personally liable except to an innocent party dealing with him, who would otherwise suffer loss.

CHAPTER VIII.

PARTNERSHIP.

1. What is a partnership?
2. When a single joint transaction does not constitute one.
3. Effect of agreements between partners.
4. Persons who are not partners may be thus liable.
5. What course of conduct creates this liability?
6. Intention and participation in the profits as a test of partnership.
7. Factors and brokers are not partners.
8. Secret and dormant partners.
9. There may be more than one partnership name.
10. A firm may hold any kind of property.
11. Authority of a partner.
12. What a partner cannot do.
13. A partnership has no seal.
14. A partner's authority to bind his firm under seal.
15. When the minority can restrain the majority.
16. They must act as partners to bind each other.
17. The receiving of a new member constitutes a new firm.
18. Money lent to a partner for a partnership purpose is a partnership debt.
19. Money lent to a partner is presumed to be for partnership use.
20. Money lent on the credit of a single partner can be recovered only of him.
21. A partner is liable for the acts of his co-partner because he is a general agent.

22. Liability of a firm for the acts of a dormant or secret partner.
23. Good faith on the creditor's part is required.
24. When a firm is liable for the criminal acts of a partner.
25. But an illegal contract does not bind a partnership.
26. Mode of dissolving a partnership.
27. When a partner will be prevented from transferring his interest.
28. Effect of the death of a partner.
29. Effect of insanity or imprisonment.
30. When a firm is thus dissolved an account may be taken.
31. Sale of a partner's entire interest causes a dissolution.
32. Effect of the retirement of a partner.
33. He should give notice of his withdrawal.
34. A dormant or secret partner is not liable after his retirement.
35. Liability of a firm and partners for firm and individual debts.
36. Effect of dissolution.
37. The survivors are not partners.
38. Authority of a liquidating partner.
39. To whom payment should be made.
40. Authority of a partner to take the firm property and pay its debts.
41. Limited partnerships.
42. Same subject.

1. A partnership is a combination of two or more persons of their property, labor or skill, for the purpose of making a common profit. Frequently the word firm is used instead of partnership, but in law the term partnership is the most common. Any persons who are competent to transact business on their own account may form a partnership.

2. A single transaction of several persons from which neither profit or loss arises, will not create a partnership. Nor will a purchase by them all if each party takes his distinct share. But persons may act as partners in a single transaction. On one occasion A chartered a vessel to take a cargo of flour from Philadelphia to Lisbon. A part of the flour belonged to A, a part to B, and the remainder to C, who was in Lisbon. It was sent to C and was marked as his property for the purpose of protecting it from British cruisers. Had the vessel reached Lisbon, the flour would have been sold by C. The three were regarded as partners in the transaction. More generally, whenever there is an agreement to enter into business, or to do some particular thing, and to share the profits and losses, this constitutes a partnership. The partners may agree to share the profits in whatever proportion they please; in the absence of an agreement, it is presumed that they are to be shared equally.

3. Partners may also agree concerning the mode of dividing the losses, or that one or more of their number shall sustain them. An agreement of this kind is valid between them, but all are responsible to third parties, unless they knew of the agreement. More generally, stipulations in articles of co-partnership, limiting the power of a partner, are not binding on third parties who are ignorant of them. In other words, each partner is abso-

lutely responsible to every creditor for all the debts of the firm. Persons could not safely do business with a partnership if secret agreements between them were binding on others. Unless outsiders have knowledge of them, they are in no way affected by them.

4. Persons may be liable as partners to third parties who are not partners as between themselves. If one by his speech or conduct leads another to believe that he is a partner in a firm, and thus believing a contract is made to which the firm is a party, he is responsible even though he is not a partner. The reason for this rule is plain. It is to prevent loss to which creditors would be exposed. If a person puts himself in the position of a partner before the world, and another gives credit to the partnership by reason of his conduct, he should be answerable therefor. For example, if he should declare that he had an interest in the concern with others, or conducted the business of the partnership as a partner, accepted bills or suffered his name to be used on cards, or signs, or in advertisements, he would be regarded as a partner. The declarations or acts, however, of one person cannot make another person liable as a partner without his co-operation or consent by word or act. Again, though one who holds himself out to the world as a partner when he really is not one is nevertheless responsible to a creditor thus regarding him as a partner, he is

not thus responsible to a person who knew in truth that he was not one.

5. What act may be regarded as establishing, or tending to establish the partnership relation, is not easily answered. Each partner is a general agent of the firm, and his conduct within the scope of the business is binding on the others. This question has often arisen in the purchase of goods for which notes have been given. If two persons, who are not partners, nevertheless so act and speak as to lead the business men of the community in which they live thus to regard and trust them, the law considers them as holding that relation. If, therefore, they should purchase a stock of goods and agree to give their joint notes for them, and one partner in the other's absence should do so, his act would be strong evidence of a partnership, rendering both liable therefor. On one occasion a partner in a grocery store bought lumber on his own account and gave a note signed in the firm's name, which the payee indorsed to L, who received it without any knowledge of the purpose for which it was given. Though the partner's conduct was a fraud, the firm was liable, but it would not have been had L known the nature of the transaction. Should two persons be sued as makers on a note signed by one, who is a member of a partnership, and the other should admit his liability, this would be evidence of the existence of a partnership.

6. There has been much discussion concerning the test of a partnership. Sometimes the courts have said that the true test was an interest in the profits and in the sharing of the losses. Both have been regarded as essential to create a partnership relation. Of late, the courts look more to the actual intention of the parties and their actual ownership of the funds of the partnership. One may think that this question can always be easily answered, but it cannot be. Thus, a clerk may receive in the way of compensation a share of the profits for his skill or other ability. In such cases is he to be regarded as a partner, or is this division of profits simply a mode of remunerating him? The courts have not always been uniform in deciding this question. It may be said, however, that in the later cases especially, a clerk who is remunerated in this manner has not been regarded as a partner. Whenever a partnership fails, of course creditors are desirous of sweeping within the range of liability the greatest number of persons possible, and it is on such occasions especially that this question arises concerning the persons who compose the partnership.

7. Factors and brokers who do business for a commission on the profits, masters of vessels who engage for a share of the profits, and seamen employed in whale ships, are not partners. The question relating to the seamen engaged in the whale fisheries was decided many years ago, when

that was an important industry. If there was a good catch, then the profits might be very considerable ; if unsuccessful, then the seamen received nothing, outside their living and perhaps their outfit, for their toil. The shares they received were called lays, and in one sense the business was a kind of lottery, depending largely on unknown conditions.

8. A secret partner is an actual participant in the profits of the concern, but is not avowed or known to be one. A dormant partner takes no part in, or control of the business. Even though creditors do not know of their connection with the firm at the time of giving credit to it, both are liable, if their partnership relation is discovered, on the ground of their interest and participation in the profits. A nominal partner holds himself out to the world as one, when in truth he is not. He also is liable to creditors of the firm, for the reason that he justifies them in trusting the concern on his credit.

9. A partnership usually has only one business name, but there is no objection to the use of different names, especially for distinct business transactions. Thus, there may be a firm of A, B & C for general business, and A, C & Co. for buying and selling negotiable paper.

10. A partnership usually may hold any kind of property. It may hold real estate, as well as personal. It may be formed to buy and sell

land, or to cultivate it. Usually partnerships exist for the purpose of the production, or the purchase and sale of personal property. There are, however, land companies for the improvement and sale of land.

11. The authority of a partner is very great. Every partner is regarded as a general agent of the partnership and having authority to bind all its members and property in transactions that relate to the usual business of the firm. His authority extends to the making or indorsing of negotiable paper, and to all transactions that are within the usual business of the firm. But the holder of a note or bill signed or indorsed by a partner without authority has no claim against the partnership if he ought to have known that the partner had no right to sign or indorse it.

12. A partner cannot bind his firm to become responsible for the debt of another. He cannot sign a letter of credit, nor submit a disputed claim to the decision of others, because these things do not belong generally and properly to commercial business. Of course, any acts of a partner may be adopted and ratified by his co-partners, and when they are, they have the same force as though they had been originally authorized. Such ratification may be in a formal manner ; or it may be by doing things from which a ratification can be implied, especially the receiving and retaining of the results of the acts ratified. This, perhaps,

is the most common mode of ratification. For example, the taking and holding of the money resulting from a transaction.

13. A partnership has no seal and can have none. Deeds and other instruments are sometimes executed A, B & Co., and a seal is added or affixed to the name. This, in truth, is no seal at all, and if the instrument needed a seal to make it valid, for example, if it were a deed of land, it would be void. This consequence, however, is sometimes escaped by declaring the seal to be each partner's. As the intention of the parties doubtless is in such cases to make a good conveyance, the law in some states, perhaps, has been rather lax and has declared such instruments to be valid; but, as we have already remarked, a deed thus executed would be imperfect for the reason that a partnership can have no seal.

14. Formerly, a partner could not bind his co-partners by an instrument to which he had added a seal after his name, unless he was authorized by a similar instrument to execute the other. Furthermore, it was declared that if they acknowledged his authority afterward the defect was not cured. Now, however, a partner may bind his firm by a sealed instrument that is in the firm name and pertaining to ordinary partnership business whenever the other partners consent before its execution, or adopt and ratify it afterwards. Furthermore, their consent or ratification may be by word as well as by seal.

15. The contemplated action of the majority may sometimes be restrained by the minority. For example, a partner may stop an interview or a negotiation that was only begun, and prevent a bargain that would bind him, by giving notice to the proper party of his refusal in season. But if the notice were not given soon enough, he could not prevent its completion, as the third party ought not to suffer.

16. Partners must act as partners to bind each other. Thus, if a partner should make a note and sign it in his own name and also his partner's name, it would not bind his partner, for he has no authority to make such a note. His only mode of signing is the partnership name. If he signs as an individual, he would be held as an individual ; if he signs the name of another partner, he would have no authority to do this, and his partner could not be held liable on the note or other obligation.

17. The receiving of a new member constitutes in law a new firm. It may recognize the old debts by agreement, or by paying interest, or in other ways. When this is done, the new firm is liable for the old debts, but there must be some act from which the assent of the new member to become liable for the old debts may be inferred, otherwise he is not liable for them. Ordinarily, he would not think of doing such a thing without receiving some kind of benefit. Consequently,

the law protects him from liability unless he clearly has agreed or promised to pay them.

18. Money lent to a partner for partnership purposes is a partnership debt. Again, if the money is not used for the firm, but was borrowed by a partner on its credit and under circumstances that justified the lender in supposing that it was to be used for a partnership purpose, the partnership is responsible. And if a partner uses money that he has in his possession as a trustee for a partnership purpose with the knowledge of his partners, the partnership is liable therefor. Even though not knowing that the money was of this nature, if they were directly benefited by the transaction, they would be regarded as having authorized its use and consequently would be responsible for it.

19. Without evidence showing to whom the credit was given, the fact that money lent to a partner was applied to the use of his partnership determines its liability for the amount.

20. If a person gives credit to a single partner, then he can look only to him, although the money was applied for a partnership purpose; but if the partner declared that he was borrowing for the firm to which the lender gave credit, and the transaction was a fair one on the lender's part, the firm would be liable although the money was wrongfully appropriated by a partner to his own use. The application of this principle has some-

times been severe on partnerships, but it is evidently just. It is one of the consequences of the authority possessed by a partner. It is an abuse of authority, but when persons form a partnership they know, or should know, the authority of each one in this regard. If, on the other hand, a partner was not authorized to borrow unless the others consented, or rather without united action, then the firm would often be hampered in doing business. It seems necessary, therefore, for the successful transaction of partnership business, that each partner should have authority to borrow, notwithstanding the great danger of an abuse of it by thus wrongfully using money borrowed on the credit of a partnership for an individual purpose. If some one must lose in such transactions, surely the partnership that has given rise to the creation of such authority ought to be the loser rather than an innocent person who may have trusted a member supposing that he had full authority to borrow money.

21. The ground of liability of a partner for the acts of others is that of a general agency for the transaction of all business within the scope of the partnership. The law of partnership is only a branch of the law of principal and agent. As an eminent jurist has remarked, the real ground of liability of a person as a partner is that the business has been carried on by persons acting for him.

22. A dormant or secret partner does not escape liability for goods purchased by an open partner whenever his relationship is afterwards discovered. But if the relationship was known at the time of their purchase, and credit was given only to the open partner, the other would not be liable.

23. A partnership is liable only to one who deals with a partner in good faith. Thus, if one receives negotiable paper bearing the firm's name knowing that it was not given in the business of the firm and was without consideration, he cannot hold the firm. And if a creditor of a partner should receive for his separate debt a partnership security, this would be a fraud unless the partner had, or was supposed by the creditor to have, the authority of the rest.

24. Again, a partnership may be liable for an injury caused by the criminal or wrongful acts of a partner that were committed in the transaction of partnership business, and especially if the partnership gave to the wrong-doer the means and opportunity of wrong-doing. Thus, co-partners are liable for the fraudulent representations of a partner relating to partnership business, though having no knowledge of them at the time they were made, nor approving of his conduct in making them after this was known. Says an eminent jurist: "It has long been established that a partner is liable for the consequences of frauds practiced by his co-partner in the transaction of

the business of which he was entirely ignorant, and although he derived no benefit from the fraud. This is upon the ground that, by forming the connection, partners publish to the world their confidence in each other's integrity and good faith, and impliedly agree to be responsible for what they shall respectively do within the scope of their partnership business."

25. An illegal contract, however, made by a partner will not bind his partnership, for all the parties to it are presumed to know the law, that no bargain can be enforced that is illegal. Thus, if a partner should borrow money and agree to pay usurious interest, his partners would not be bound by the transaction, for an agency or authority to a partner to violate a statute cannot be implied. Such an act is clearly illegal, and is not within the scope of a partner's authority.

26. Next we may inquire concerning the mode of dissolving a partnership. If the terms of agreement say nothing on this subject, it may be dissolved at the pleasure of either partner. No partner, however, can exercise this power wantonly, to the injury of the other partners, without making himself responsible for the losses caused by his act. If there be an agreement, fixing a period for its existence, this is binding.

27. Should either partner attempt to transfer or assign his interest for the purpose of withdrawing from the firm against the will of the others, and

without good reason and contrary to his agreement, a court of law would prevent him from doing so. For the consequence of transferring his interest would be to dissolve the partnership, and surely he ought not to be permitted to do this without good reason. If, however, a proper reason exists, he may transfer his interest. By so doing the person to whom his interest is transferred does not become a member of the firm.

28. The death of a general, or even special partner causes a dissolution. His personal representatives, who are his executors or administrators, do not take his place unless the terms of partnership state that they are to succeed him. There are various reasons why death should dissolve a partnership. First of all may be mentioned the fact that when persons form a partnership they are supposed to know each other, their ability, means, etc., their general fitness to engage in the common enterprise, and it would be inexpedient for the law to permit others to take the place of a deceased member. It is true that a dissolution in consequence of death may work hardship, and perhaps loss to a partnership, by the withdrawal of the means, credit and ability of the deceased member. That is one of the risks always taken in forming a partnership; but it is safer to regard a partnership as dissolved whenever a member dies than it would be as continuing.

29. If either party is unable to do his duty by

reason of insanity, or imprisonment, or is guilty of wrong-doing, a court will declare the firm to be dissolved ; and if the original agreement was a fraud, a court will also declare it void from the beginning.

30. Whenever a dissolution is thus decreed or declared by a court, an account will be taken between the partners if requested by any partner. Furthermore, if necessary, a court will order a sale of the effects and distribute the proceeds. Such a decree will also be made if a partner dies or becomes bankrupt, whenever this is necessary.

31. If the entire interest of a partner is sold by the order of a court to pay his individual indebtedness, this causes a dissolution. A partner may owe a large sum of money outside the partnership for his individual transactions, and his interest in the partnership may be taken by the creditors to satisfy their claims. This is by no means an infrequent thing. The dissolution thus caused may be, indeed, an unfortunate thing for the other partners, but it is one of the risks of uniting in the undertaking.

32. The retirement of a partner also causes a dissolution. The law regards the remaining partners as a new firm, even though the name remains unchanged.

33. A retiring partner should give notice by public advertisement of his retirement. It is also said that he should give personal notice, by letter

or otherwise, to all who usually do business with the firm. This is not the rule everywhere. After such a notice he is not responsible, even though his name is retained in the firm by the other partners, if this is done without his consent. Nor is he responsible to any one who has actual knowledge of his retirement.

34. A dormant or secret partner is not liable for a debt contracted after his retirement, although no notice has been given by him; for as he is unknown and cannot add credit to the firm, his retirement does not affect his liability.

35. The property of a partnership is bound for the partnership debts, and the creditor of a partner has no claim to partnership funds until the partnership debts are paid. If there be a surplus, he may have that partner's interest therein in payment of his private debt. But what shall be said concerning the individual property of partners? Is that held first for their individual debts instead of the partnership ones? The courts have not always been uniform in their decisions, but the rule best established is that partnership property is held for partnership debts, and individual property for the debts of the individual members. If there be a balance of partnership property after the payment of its debts, it belongs to the partners and can be applied to the payment of their individual debts. On the other hand, if there be property left by a partner after paying

his individual debts, it may be devoted to the payment of the debts of the firm of which he is a member.

36. Lastly may be considered the effects of dissolution. If this is caused by the death of any partner, the whole property goes to the surviving partners. They hold it, however, not as their own, but only for the purpose of settling the affairs of the partnership. They have all the power that is necessary for this purpose, and no more. If they carry on the business with the partnership funds, they do so at their own risk, and the representatives of the deceased may require the return of the capital he invested and also his share of the profits.

37. The survivors are not partners, but simply owners with the representatives of the deceased of the stock or property in their possession, and they have all the necessary rights to settle the affairs of the concern and pay its debts. After a dissolution one has no authority to make new contracts in the name of the firm, except as we have already mentioned, in the way of the settling of its affairs. It is a common thing when a partnership is dissolved by mutual consent to provide that some one of the partners shall settle the affairs of the concern, collect and pay its debts, and the like, but this will not prevent any person from paying a debt to any partner due to the firm. If this is done in good faith his release or discharge is valid.

38. A liquidating partner can do many things. He can give renewal notes and make indorsements, and collect money that is due to the concern. And if a debt has become outlawed, that is, cannot be collected because the owner has not done so within the period fixed by law, he may admit that the debt is alive. When an acknowledgment has thus been made by him, the debt can be collected as it could have been in the beginning.

39. If the assets of a firm are transferred to any partner or other person for the purpose of liquidating its debts, any debtor who had notice of this would be bound to make payment to such person, and if he paid any one else he could be required to pay the money over again.

40. Sometimes a partner has authority to take all the property and pay all the debts, but this agreement, though it may be valid between the partners, has no effect on the rights of third parties against the partners. They have a valid claim against the partners, of which they cannot be deprived without their consent. The consent of a creditor, however, may be inferred, though not from slight evidence.

41. Lastly may be considered the subject of limited partnerships. These have been established in many states by statute. A limited partnership may be formed for transacting any agricultural, mercantile, mechanical, mining or manufacturing

business by two or more persons who must contribute a specific sum of actual money as capital. Such partnership may consist of one or more persons who are called general partners, each of whom is responsible for all the debts. Besides general partners, other persons may contribute in actual money specific sums as capital, who are called special partners and who are not liable for the debts of the partnership beyond the amount thus contributed by them. The general partners only are authorized to transact business and sign for the partnership and to bind it. The persons who are desirous of forming such a partnership are required to make and sign a certificate containing the name under which the partnership is to be conducted, the general nature of the business, the names of all the general and special partners, and also the amount of capital contributed by each special partner, and the period for beginning and ending the partnership.

42. The law in most states provides that the terms of the partnership must be recorded and published so that the public may have an exact knowledge of its nature. A special partner may sell or assign his interest with the assent of his partner in writing without causing a dissolution of the partnership. A general partner with the written assent of his partner may also sell and dispose of his interest in the partnership ; or on his death his administrator or executor may, in

like manner, sell his interest for the benefit of his estate. A special partner from time to time may examine into the state and progress of the partnership concerns, and may advise concerning their management, but he cannot transact any business on account of it, nor can he be employed for that purpose as an agent or attorney. Furthermore, the law generally provides that if he shall interfere in its affairs contrary to law, he shall be deemed a general partner. The capital of such a partnership may be enlarged by increasing the membership of special partners, or by new subscriptions from the old ones. The law also provides for recording the terms of the agreement and their publication; and all renewals or changes must have similar publicity. This is for the purpose of protecting the partners, as well as for the benefit of those doing business with the firm.

CHAPTER IX.

NEGOTIABLE PAPER.

1. What is a negotiable bill or note?
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4. A bill of exchange defined.
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1. Notes, bills of exchange, checks and other instruments are daily given by persons for various purposes. The most general division of them is into two classes, negotiable and non-negotiable. A negotiable instrument can be transferred by indorsement or delivery; a non-negotiable one can

be transferred only by an assignment. Formerly, the transfer of notes was forbidden as a protection to the persons who made them. But this barrier was removed first from bills of exchange and afterwards from promissory notes. Whenever, therefore, these instruments are so drawn that they can be transferred by indorsing and delivering them to the transferee or purchaser, or by delivery only, they are negotiable. The barrier to the transfer of bills of exchange was taken away by the English common law, but whether the transfer of promissory notes was done in the same manner remains an open question. Parliament, however, settled the doubtful right during the reign of Queen Anne by declaring that promissory notes were assignable or indorsable like inland bills of exchange.

2. A negotiable instrument possesses four characteristics. The first is that it can be so effectively transferred by the original holder or owner that the transferee can sue in his own name the maker or subsequent promisor for the fulfillment of his promise, should he fail to observe it. Second, should the instrument be stolen and transferred by a thief to another for a valuable consideration in the usual course of business before maturity, the purchaser would acquire a perfect title, which he could not to a horse or any other thing. Third, the holder of a negotiable note is entitled to the full amount mentioned on

the face of it, and a defense which the maker could have made against the payee, had he kept it, will not avail against a later holder who acquired it in the usual course of business and before its maturity. Lastly, a negotiable instrument imports a consideration, like a sealed instrument. The reason for thus regarding a sealed instrument is the careful manner in which it is made or executed. This quality was first possessed by bills of exchange, and by statute has been extended to promissory notes. Between the immediate parties the truth may be shown, but not between others. Notes and bills that are not negotiable are in common use. They can be transferred, but the transferee or holder is not so perfectly protected as the holder of a negotiable note or bill.

3. The three kinds of negotiable paper that are best known in the commercial world are promissory notes, bills of exchange and bank checks. A promissory note may be defined as a promise or agreement to pay a specific sum at the time therein limited, or on demand, or at sight, to a person named therein, or his order, or to bearer. No precise form of words is necessary ; they are sufficient if they create an absolute promise to pay money. The person who promises to pay is called the maker ; and the person who is to receive the money, the payee. If a note is payable to bearer, it can be transferred by delivery ; if it is payable

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order, it can be transferred by indorsement, which consists in writing the name of the person to whom it is payable across the back. The person who indorses is called the indorser; and the one who receives it, the indorsee. In all cases the owner is called the owner, or holder.

4. A bill of exchange may next be defined. Perhaps Byles' definition is as exact as any other; we know of no briefer. "It is an unconditional written order from A to B, directing B to pay C a certain sum of money therein named." The person who writes or draws the bill is called the drawer; the person to whom it is directed, the drawee; and after accepting, or agreeing to pay it, the acceptor. The person to whom the bill is payable is called the payee. If the bill is payable only to the person therein named, it is not transferable or negotiable; but if it is payable to him, or to his order, it may be negotiated. When this is done the payee becomes the indorser, and the person who receives it, the indorsee.

5. In their general form a promissory note and bill of exchange are quite different. To every bill there are three parties, the drawer, drawee and payee, while there are only two parties to a promissory note, the maker and payee. Again, the acceptor of a bill, or person who agrees to pay it, is the real or primary debtor, but the form of a note is so changed by transferring it to a third person that it is very similar to a bill. The in-

dorser then resembles the drawer; the maker, the acceptor; and the indorsee, the payee.

6. Bills of exchange are divided into two kinds, foreign and inland. A foreign bill is drawn in one country and payable in another; an inland bill is drawn and payable in the same country. The several states of the Union are regarded as foreign in drawing bills. If the drawer and drawee of a bill reside in Pennsylvania and the bill is payable in New York, it is foreign; but if the drawer and payee reside in Pennsylvania and the drawee in New York, it is an inland bill. The states in which the parties live should always appear by the instrument, as the courts cannot always infer their residence from the name of the city, town or other place mentioned.

7. Lastly, a bank check may be defined. An eminent law writer has furnished this definition. "A check is a brief draft or order on a bank or banking house, directing it to pay a certain sum of money." It resembles a bill of exchange, and is usually drawn payable either to bearer, or to the order of some person. Indeed, it is so nearly like a bill that, in some states, when it is not paid the same steps must be taken to preserve the liability of the parties as are taken with a bill of exchange.

8. To be negotiable an instrument must contain proper words to indicate that purpose or intention, and the most frequent are the words, "to order," or "to bearer." Though generally used in com-

mercial instruments, and convenient and expressive, they are not the only stamps of negotiability. Words from which it can be inferred that the maker intended the instrument to be negotiable have that effect. A note for the payment of money on which another stipulation or agreement has been indorsed by the payee is to be regarded as a second instrument, and cannot be enforced until the stipulation has been performed.

9. Again, an instrument is non-negotiable whenever it lacks proper words of transfer, or contains any stipulation written or printed that qualifies its negotiability. Thus, an order on a bank to pay a person specified, or order, \$1,000 in nine weeks from date providing he, or his transferee, should present to the bank with the order a notice ticket and also produce before the time of payment the drawer's deposit-book, is not negotiable. The law does not attempt to render paper negotiable to which the parties have not given this character. But if a stipulation is merely of an explanatory nature, the negotiability of the instrument is not affected. For example, a statement in a note that it was given for advancements, or a requirement that notice to an indorser be sent at a specified place, or a stipulation stating for what purpose the note was given. Nor does the giving of security with a note for its payment destroy its negotiability. Nor will a clause authorizing the holder to sell the security should the maker not fulfil his promise.

10. The most general rule concerning the form of the promise is certainty. It must be unconditional, and this rule must be strictly observed, for, as an eminent jurist has remarked, if this were not done, paper would soon cease to be a courier without luggage, and become loaded down with conditions and all kinds of impediments so that its usefulness would be greatly impaired, if not entirely destroyed.

11. The certainty required by law applies first to the medium of payment. This can be only money. Formerly, when the circulation of money varied greatly in value, a promise to pay in notes of the chartered banks of a state, or in addition to the stated amount in bills of exchange, "the current rate of exchange," or "in current funds," at a place mentioned, or "in current bank notes," destroyed the negotiability of the instrument. A bill or note that is to be paid in goods or produce is not negotiable.

12. Not only must the medium of payment be certain, but also the amount. A stipulation, therefore, for a collection fee, should the maker not pay at maturity, destroys the negotiability of the instrument. This rule, however, does not prevail in all of the states. In several of them such a stipulation does not affect the negotiability of the instrument.

13. The time for payment must be certain. If, however, the maker, solely by his own will, can

pay at an earlier period, the negotiability of the instrument is not impaired.

14. Again, this rule that a negotiable instrument must be certain and without contingencies applies only to stipulations that affect its character during the period of its proper life, that is, before the end of the time when it must be paid. A stipulation, therefore, not affecting the negotiability of an instrument during its specified term of life, does not in any manner affect its negotiable character.

15. Next may be considered the parties to such an instrument. In every contract there must be two or more parties who possess the legal ability to make, or who can be compelled to perform, their promises or undertakings; but some persons who make and indorse negotiable paper, though disabled from contracting generally, cannot defend on the ground of personal disability. The law has wisely limited the authority of a minor, and he cannot engage in trade, or give bonds, or make or indorse notes. If, therefore, he should become a surety on a note, the contract must be confirmed after he has attained full age. A mere acknowledgment or part payment would not suffice. But if he should give a note for necessities there could be a recovery on this, or on the contract for them. Again, if he should indorse a note the holder would acquire a good title against all the parties thereto except the minor himself.

16. At common law a married woman cannot sign notes, but this right has been conferred on her in most states by statute. Her authority to sign them differs somewhat in the various states, but in general it may be said that she possesses ample authority to sign for whatever may be needful in the transaction of business, in the purchase of property, in the payment of her debts, and generally for any purpose relating to her welfare.

17. Notes and other instruments are often made and taken by agents, and numerous questions have arisen concerning their authority. Some of these have related to their general authority, while others, when this was lacking, to the conduct of their principals in ratifying or disapproving their conduct. Let us first consider the cases of an agent's authority to give notes. A clerk in a store has no authority to borrow money and draw bills and notes in the name of the firm that employs him. If an agent is authorized to sell for cash, he cannot take promissory notes for the purchase money. But the cashier of an incorporated bank is the general executive officer to manage its concerns, and his official notes or indorsements are regarded as those of the corporation. The president of a bank has authority to accept security for a note in payment of it, and also a new note in settlement of the old one. Likewise an insurance company is bound by the

acts of its agent who accepts notes for the premium.

18. The cases in which an agent cannot be held personally will next be considered. An officer of a corporation is not liable who makes known his principal's name, even though he should give a note in his own. Obviously he is not personally liable when he contracts on behalf, or in the name of his principal, in performing the business of his agency. One of the most familiar applications of this principle is in the drawing of a bill by an agent on his principal for a purchase that is made solely for the principal's benefit. For example, an agent who is authorized to purchase cotton has the right to draw on his principal in favor of the bank that advances the money to pay for it. If the agent's act is disapproved, the cotton must not be received. If it is, the principal must accept and pay the draft. Nor need the agent show his authority to make the purchase to the bank that cashes the draft. If he has the authority, that is enough without showing it.

19. A principal who accepts a note taken by his agent is bound by the agent's representations and stipulations, even though he was not authorized to make them. And if an agent who has authority only to collect a debt, takes a note for it payable to himself, and his conduct is ratified by his principal, he is bound thereby and the debtor is released from liability to him on the original claim.

20. The liability of persons of unsound mind to give and indorse notes may now be considered. A person who has given his note and received the money thereon from a bank or other party not knowing his condition must pay it unless a fraud was practiced on him. He cannot be permitted to obtain the money of innocent parties and retain the same.

21. A person who takes advantage of the drunkenness of another and procures his signature to a note, commits a fraud and the transaction can be disregarded or confirmed. Whatever the rule may have been, now if the fraud affects the individual interests of the parties merely, the transaction may be ratified. The note though must be based on a sufficient consideration and be free from any other legal defect.* The contract of a habitual drunkard, after his legal condition has been ascertained, is void.

22. The defense of drunkenness cannot be interposed against the holder of a note for value who has taken it in good faith. Thus, M, when he was drunk, made a negotiable note that was bought by a bank for half its value. The bank was informed that it had been given for a patent hay fork, and required a guaranty for its payment. The bank was declared to be free from gross negligence in taking the note without making inquiry

* For example, it must not involve a crime that cannot be privately settled.

of the maker. Even gross negligence would not have defeated the bank's title without proof of having taken it in bad faith, or with knowledge of the fraud.

23. An accommodation maker or indorser of a note who receives no benefit therefrom, who was not of a sound mind at the time of making or indorsing it, whether this was known at the time by other parties or not, is not liable. But he is liable when his indorsement was a renewal of another given at a time when his soundness was unquestioned.

24. One of the chief characteristics of a negotiable instrument is the mode of transferring it. This can be done by indorsement, whereby the same rights of ownership are conferred on the new holders as were enjoyed by the other. Additional rights also are acquired, as the indorser becomes conditionally liable for its payment, unless he is relieved by agreement. When a note is indorsed and discounted by a bank or individual, the ownership is transferred, and the payee has no further interest therein.

25. Although an indorsement imports a writing on the back on a note, this may be made on a separate paper, which is called an allonge. The note need not be so full of names that no more can be added to justify an allonge. This may be done when the bill or note has been mislaid, or is at another place at the time of making the indorsement.

26. An indorsement generally is in blank, or in full. A blank indorsement consists simply of the name of the holder of an instrument written across the back of it, thereby conferring the right on the indorsee of writing over the holder's name an order to pay the sum mentioned therein to the indorsee or to his order, or of writing any other contract of indorsement that is not contrary to usage. An indorsement in full is one which mentions the name of the person to whom, or to whose order the money specified in the instrument is to be paid. Thus, a note indorsed "Pay to B or order," signed by A, is an indorsement of this kind.

27. An indorsement also may be conditional, by which the indorser directs payment to be made on the happening of a certain event. It may be absolute, whereby the indorser promises to pay without regard to the taking of the usual steps to obtain payment of the instrument. The indorsement may be qualified. For example, when he adds the words, "without recourse," he means that the holder cannot look to him for payment if the maker or other prior parties fail to pay it. And finally, another kind of indorsement is known as restrictive, in which the action of the indorsee is restricted; for example, that he must pay to B for the use of C.

28. By indorsing a note a new party is introduced and the instrument is endowed with new

qualities. The promisor becomes immediately liable to the indorsee, and the indorser undertakes to pay if the maker does not. Though the indorsement consists only of the indorser's name, or a direction to pay to the order of a specified person, the contract of the indorsement implies: first, that the instrument itself and the signatures thereon are genuine; second, that the indorser has a good title thereto; third, that he is competent to make a contract; fourth, that the maker is competent to bind himself to pay the instrument and on due presentation of it will pay the same at maturity; and fifth, that if, when it is duly presented, it is not paid by the maker, the indorser will, on proper notice of its non-payment, pay the same to the indorsee or other holder.

29. Frequently a note contains on the lower left-hand corner the phrase, "credit the maker." This direction, signed by the payee-indorser, is not a restriction or limitation of his indorsement. A good title is conveyed to the holder, and the maker is presumed to have received the proceeds. As the court remarked on one occasion, "It is a short check in favor of the maker for the money to whoever shall discount the note." This direction is clearly an indication that the note is given for an accommodation and is without consideration, and also that the indorsement is without consideration, though this fact is no defense against other parties.

30. Indorsements are not confined to the narrow formulas already given; they may be in other words. When departures occur, questions may arise concerning their intent and effectiveness. Thus, a promissory note was indorsed, "For value received I hereby assign, transfer and set over to B, all my right, title, interest and claim in the within note." This passed the legal title without destroying its negotiability. Nor is the negotiability of a note destroyed by affixing a seal to the indorsement, either by a corporation or an individual.

31. Sometimes a note is indorsed, "without recourse." The effect of adding these words is to relieve the indorser from liability for the payment of the note should the maker or other parties not pay the same at maturity. Its negotiable character is not thereby affected.

32. With respect to an indorser's authority to indorse, something may be said. When the secretary of a limited partnership has indorsed a note and the company has received the proceeds, it cannot deny his authority to make the indorsement; for a person cannot repudiate the authority of his agent and enjoy the benefit of his act. And an agent or party doing business for another, who takes notes, indorses and transfers them to his principal, may recover the amount from him whenever he is compelled to pay by reason of his indorsement. Thus, A sold lumber to B for D,

and with his consent took a note payable to his own order, which he indorsed and transferred to D. A having been compelled to pay as an indorser, recovered the amount from D.

33. Two or more payees of a bill or note that is jointly indorsed by them do not thereby render themselves liable as partners, and their liability is equal regardless of the order of their indorsement.

34. An indorser who gives credit to a note or bill by his indorsement, whether he has received any consideration for so doing or not, must make the paper good to any subsequent indorser who received it for value and in the ordinary course of business. In other words, he guarantees the genuineness of the prior endorsement. He cannot therefore, when the note indorsed by him has not been paid, call on the holder to sue the maker, and should he refuse insist that he is thereby released. The indorser's duty is to pay the note and sue the maker himself.

35. The last indorser of a negotiable note who pays the amount to the holder may recover thereon against any prior indorser.

36. Sometimes a note is guaranteed as well as indorsed. The liability assumed by a guarantor is quite different from that assumed by an indorser. This subject will be more fully considered in another chapter.

37. The statute of frauds requires a guaranty to be in writing, but when a guarantor's promise in

effect is to pay his own debt, though that of a third person is incidentally guaranteed, it need not be in writing. The statute means the mere promise of one man for the debt of another. The common case of the holder of a third person's note that is transferred for value with a guaranty can be referred to this principle. The assignor guarantees in reality his own debt. But an indorsement of a note by one who is not a party thereto is not a sufficient writing in some states to satisfy the statute.

38. To hold an indorser, he must be properly notified of the non-payment of the note; and whether this has been done is a question of fact. If he was not properly notified, this defense will avail whenever it is clearly proved.

39. A great variety of defenses may be successfully made by an indorser that will be briefly noticed. One of these is usury; another is the maker's discharge by the holder. Nor can he be held when he has paid the note; nor when its issue was unlawful; nor when it was non-negotiable; nor when his indorsement was procured by fraud. Finally, an indorser may avail himself of any defense existing between the holder and the maker, or principal debtor. This is evidently a just principle, for surely the holder has no more rights against an indorser than he has against the principal debtor. If, therefore, he could interpose some just claim as a partial or complete defense,

the indorser should be permitted to avail himself of it.

40. With respect to the cases in which an indorser is not relieved, we may remark that ignorance of the law concerning the effect of an indorsement is no defense. Nor can an indorser discharge himself by showing the holder how he can collect his money of the maker.

41. Sometimes a note drawn in the usual form is indorsed by a third person. Such an indorsement is irregular and the paper thus indorsed has been called an "anomalous instrument." Many of the courts have been puzzled to determine the liability of such an indorser. As the law regards the indorsement as an accommodation for the payee, the indorser is not liable so long as the note remains in the payee's possession. But when the payee transfers it, as the indorser intended to pledge his responsibility in some way for its payment, he is regarded by the courts in some states as assuming the liability of a second indorser, and the payee the liability of a first indorser. To render the indorsement of the third person or second indorser effective, therefore, the payee must indorse before him, so that, should the maker fail to fulfil his obligation and the second indorser be obliged to pay it, he can recover the amount paid from the payee or first indorser. And if the payee does not thus indorse it when transferring it, the transferee or holder

cannot recover from the second indorser, for the reason that the law regards the payee's action in negotiating it without his indorsement as a fraud. In other states he is regarded as a surety, or guarantor; in others, as a first endorser; in others, as a joint maker. The highest legal tribunal has declared that "when a promissory note, made payable to a particular person or order, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction, and the understanding of the parties at the time the transaction took place." * Daniel, who is considered one of the best authorities on this subject, remarks that, in his opinion, a person who puts his name on the back of a negotiable note before it is endorsed by the payee, should be regarded as a first indorser. If he intended to be a second indorser, he should have declined to put his name on the note until it was first indorsed by the payee.

42. Sometimes oral evidence has been admitted to show the intention of the indorser; but its admission is now excluded in some of the states by statute. It is regarded as contrary to public policy to permit an indorsement to be explained or varied in any manner by such evidence, except in cases of fraud, accident and mistake. Daniel asserts that evidence is almost universally ad-

* *Rey v. Simpson*, 22 How., 241.

mitted to show that such a party is a first indorser, and it would have been far better if the courts had generally presumed such to be the intention and established a rule that is clear, intelligible and certain in respect to so important a relation to commercial paper.

43. To fix the liability incurred by an indorser, the holder must demand payment of the maker at the proper time and place, unless a reason exists for not doing so. For this purpose the holder, or a notary public, or some other person authorized by the holder, must call on the maker at his residence or place of business and present the paper and demand payment, and should he fail to pay, give immediate notice to the indorser, or put the notice in the post-office for transmission to him by the first mail, to the post-office most convenient or nearest to his residence.

44. The presentment must be made to the maker at his usual place of business during office hours, unless a reasonable excuse exists for not making it. A presentment through the post-office will not suffice. In ascertaining the maker's residence, the date of the note creates the presumption that he resides at the place named therein, and inquiry should be made there.

45. In presenting the paper and demanding payment, due diligence must be exercised, for if it is not, the indorser is discharged even though the note was overdue when it was indorsed. What

this is depends on circumstances, and in many cases on the time, mode and place of receiving paper, and on the relations of the parties between whom the question arises.

46. The questions of due diligence in the time of presentment and giving notice are said to be mixed ones for the judge and jury to decide. The judge must state the law to the jury, but they must determine the facts when they are disputed, and then the judge must decide whether they satisfy the law or not. When they are undisputed then the only question is to determine whether or not they are sufficient, which must be done solely by the judge.

47. In presenting checks for payment two rules must be observed: first, if the person who receives the check and the bank on which it is drawn are in the same place, the check must, in the absence of special circumstances, be presented the same day, or at latest, the day after it is received. Second, if the person who receives the check and the bank on which it is drawn are in different places, in the absence of special circumstances the check must be forwarded for presentment at the latest on the day after it is received. An agent to whom it is forwarded in like manner must present it at the latest on the day after receiving it.

48. In presenting notes and bills payable at a fixed date, they must be presented to the maker or acceptor, or in his absence to his clerk or

agent, at maturity. An earlier demand is worthless.

49. A bill of exchange payable at sight, or on demand, must be presented within a reasonable time. Payment of a note or bill payable on demand may be demanded as soon as it is signed; but the condition on which the indorser is liable is that payment shall be demanded within a reasonable time and the earliest notice possible be given of the maker or drawee's refusal. On one occasion an eminent judge remarked, concerning a bill payable on demand, or at sight, that it was impossible to fix any precise time; payment must be demanded and notice given as soon as these things can be conveniently done taking into view all the circumstances of the holder and drawer.

50. A bill of exchange payable at any time is payable immediately, and to charge the drawer or indorser it must be presented for payment in a reasonable time after receiving it. A delay of eight months, for example, is too long; and when the holder of a bill payable immediately has taken it from the payee, not in the usual course of business, but long after the reasonable and proper time for presentment, he is affected with notice of all the facts known by the payee at the time of the transfer.

51. The holder of a bill of exchange may present it for acceptance and have it protested should the drawer decline to accept it. In some states

presentment for acceptance is not necessary when a bill is payable at a fixed period after date. Again, in some states the courts have held that while the holder of such a bill need not present the same for acceptance, a different rule applies to an agent to whom it has been sent for collection. There is no reason for applying a different rule to an agent and requiring that he should be more diligent than his principal.

52. If a note payable on demand is indorsed, after it becomes due, a reasonable time must be allowed to demand payment of the maker. Nor is such a note regarded as overdue without some evidence that payment has been demanded and refused, even though it be several years old and no interest has been paid thereon.

53. The maker of a note payable generally has the whole of the business day on which it is due to pay it; but a note payable at a bank must be paid during banking hours; and when the holder is there until the close of the day, ready to receive payment, no further demand need be made to charge the indorser. And if the maker of a note thus payable has no funds there when it matures, a demand for payment is unnecessary.

54. Paper need not be presented for payment whenever this would be useless. The occasions when the law excuses the holder from doing this will now be described. When the maker has absconded the law does not require the making

of further inquiry; but this rule cannot be applied when the maker has merely removed from his place of residence. Whenever the drawer admits or acknowledges his liability to pay the bill he has drawn, the necessity of proving a demand of the drawee and his refusal and notice does not exist. And the proof may consist either of an express promise to pay or of other circumstances from which this may be inferred, as a part payment before, or after, the bill or check became due. Likewise, an acknowledgment of liability and promise to pay by the indorser after a default of payment by the maker dispenses with proof of presentment and notice, and throws on the indorser the double burden of negligence in this regard and that he was ignorant of it. His liability also continues whenever he waives notice of the protest. Thus, an indorser on the day when a note became due indorsed thereon a written waiver of notice and protest for non-payment, and on the same day a demand was made at the banking-house at which the note was payable, and the answer was that the maker had no money there. This was regarded as a sufficient demand. The death, bankruptcy, or imprisonment of the maker constitutes no excuse for not making a demand, because many means may remain of paying through the assistance of friends and in other ways.

55. A demand, unless it is excused, or due

diligence in trying to make a demand, must be proved in order to recover from the indorser. But in an action against the maker this is not requisite, for he is liable in any event.

56. Though an indorser's liability is conditional, the only thing to do to make his liability absolute is to demand payment of the maker at the specified place on the last day of the period for which the note was given, and to give due notice of non-payment to the indorser. For, as the contract requires the maker to pay at maturity, a strict regard of duty, which is the life of commercial law, authorizes the indorser to presume, unless he has received a notice to the contrary, that the maker has paid his obligation.

57. The notice is authentic information from the proper source that the paper has not been paid, and its object is to enable the party notified to take measures to secure himself against parties liable to him. It need not be, though it always is, in writing. Any information coming from those whose duty it is to give notice will suffice.

58. The notice must be sent by the holder himself, or by some one who has a real interest in the instrument, for the notice must assert that the holder intends to stand on his legal rights and to resort to the indorser for payment. And a bank that receives a note for collection, or as a security only, must follow the usual course of business and give notice of non-payment to the

indorser. But the holder may employ an agent to give notice for him, and very generally this is done by a notary public. In some states, but not in all, this is a part of his official duty.

59. The holder need notify only his immediate indorser, or only the indorsers whom he intends to hold. A very common practice is for the holder to notify his immediate indorser and to inclose the notices to him for the preceding indorsers, which he is expected to send to them in a similar manner. By doing this he fulfills his whole duty. He perfects his right to recover against all by properly notifying the last indorser. Another and very common practice is for the holder to give a direct notice to each indorser, and if it would ordinarily be received as soon as it would by regular transmission through all the parties, it is sufficient. In most cases, doubtless, the notice thus sent is received earlier.

60. The notary, who is generally employed, usually sends a notice to each indorser if he knows where to send it; very often not all their addresses are known. The practice is becoming more common of indicating on the instrument where the notice shall be sent, and this is desirable.

61. A notice of an indorsement by a partnership need not be sent to each member. Even after it has been dissolved a notice to one partner is sufficient to bind the other members. Persons

who own notes and bills jointly sometimes indorse them, and when they do they are not liable as partners. Consequently, a notice of the non-payment of such a bill to one will not discharge both. Each must have notice in order to be held for its payment.

62. In sending a notice the mail can be used in some cases, but not in all. When the person who is to be notified resides in the same city as the notifier, then the notice must be served personally, or at his house, or place of business. It cannot be deposited in the post-office. But a notice addressed to an indorser, deposited in the post-office of the city where both the notifier and indorser reside, is now regarded as proper by furnishing proof that it was received in time. In many states the legislatures have authorized the use of the mail for this purpose.

63. When the persons to be notified reside in different places from the notifier, even though the distance may be very short, but in an adjoining town or other municipality, or at such a distance as would render the employment of a special messenger expensive, the mail can be used. Much legal ingenuity has been expended in defining the precise boundary between personal and transmitted notice. A statute authorizing the sending of a notice through the mail in all cases would terminate this series of small legal puzzles.

64. Many questions have arisen concerning the

post-office to which the notice must be sent. The law does not imperatively require that the notice be sent to the post-office nearest to the residence of the indorser, for this cannot always be known without considerable inquiry, delay and expense. If, therefore, in the absence of precise knowledge, the notice is sent to the post-office at the county seat of a county, this will suffice, for if the indorser lives at a place nearer to another post-office, at which he usually receives his letters, the post-master will doubtless forward the notice to that office. Another rule has been established that is reasonable and in most cases can be easily applied. A notice may be sent either to the post-office nearest to the indorser's residence, or to the one at which his mail communications are usually received.

65. A notice sent on Sunday is invalid, and if an indorser should receive it, he would not be bound, nor would the irregularity in the service be regarded as waived.

66. A holder is not responsible for the receiving of a notice by the indorser. When the notice is properly prepared, directed and sent within the specified time, the holder has performed his whole duty to the indorser.* He is not an insurer for its safe and regular transmission.

* This rule does not cover the cases in which the mail is substituted for personal notice. In these, it must be shown that the notice was received, unless a statute establishes a different rule.

67. There are occasions when notices need not be given. The first that may be mentioned is war, which stops the usual communication between the parties. Thus, the seizing of mails between Pittsburgh and New Orleans during the civil war was a valid excuse for omitting to send a notice of the dishonor of a bill. The insolvency of the maker does not dispense with the necessity of demand and notice of non-payment.

68. There must be due diligence in notifying, otherwise the indorser is discharged. What this is depends on circumstances which must be ascertained, when they are disputed, by the jury. Two general rules have been established for determining the time. If the person to be notified lives in the same town as the notifier, the notice must be given by the close of the next day after it is received. Therefore, a delay to send notice of the non-payment of a note on Friday until the next Monday would be too long. If the parties live in different places, the notice must be sent by the next practicable mail on the morning of the day after making the demand. If the mail closes at so early an hour that it is impracticable to forward a letter, one sent by the next mail will be in time.

69. The time established for an indorser to notify his prior indorser is an entire day; and an agent for collection, who has indorsed a note or other instrument, must receive and give notice like any other indorser.

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69. The time for presenting a note for payment is received by a notary, and protested, the holder must have possession of the proper intelligence of his duty. The notary must attend on the party primarily liable within business hours,

70. Sometimes a mistake is made in dating a notice. Is the indorser then relieved? The law is very strict. If the demand was made on the proper day and the indorser is notified that the demand was duly made, though the notice was dated the day afterward, the indorser will be held; but if the date of the notice sent to the indorser without any explanation shows that the notice was sent too early, he is relieved. The principle governing such cases seems to be that the indorser obtains his information from the notice. If this shows that the demand was too late he is relieved; if it was too early he presumes that the mistake will be discovered and followed by a new demand, and if it is not, he is relieved. But if the demand is made on the right day, ought not the holder to be permitted to show this and hold the indorser, unless he can show that he was injured by the mistake?

71. Thus much concerning notice. A few words may be said concerning the protest. The object of this is to have proof of the presentment and demand for payment, and that the parties to the instrument were duly notified. Protests generally pertain to foreign bills of exchange and must be made only of them. As this is an easy and cheap method of furnishing evidence of these matters, the practice has become very general of protesting inland bills and notes that are not duly paid. Indeed, the custom to treat inland bills

and notes in the same manner as foreign bills has become so universal that in common parlance the terms mean the taking of such steps as are required to charge the indorser. For the same reason the word protest, sometimes employed in giving notice of dishonor to the indorsers of inland bills and notes, clearly implies a demand, non-payment and consequent dishonor of a bill or note in all cases in which a protest is necessary.

72. A notary is sometimes disqualified from acting. If he is a shareholder in a bank, or a director, cashier, teller, clerk or other officer of the institution, he is forbidden from exercising the duties of a notary in some states. In others, he is permitted to do so either by the common law or by statute.

73. In many states the sending of notices is not an official duty of a notary, but it is in some of them. The notice may be sent by the holder, but if a notary public is employed to make presentment, his employment includes the notifying of the indorser. And when the notice is duly certified and is not contradicted or questioned, it is presumed to be legal.

74. When an instrument is received by a notary to be presented and protested, the holder must put him in possession of the proper intelligence for performing his duty. The notary must first make a demand on the party primarily liable at his place of business within business hours.

He must then give notice of the presentment and non-payment to the indorsers.

75. What is a proper presentment and demand by a notary? If he follows the usage, no more can be expected of him. For example, he is not required to go beyond the limits of a state in making a demand unless this is the usage. Notes are often made payable at a bank, and when they are, their presentment is sufficient if they are actually there at the proper time to be delivered to any one rightfully entitled to them by paying whatever may be legally due.

76. A visit to the maker's place of business during business hours for the purpose of making a presentment, and which is closed, is equivalent to an actual presentment and demand. But a demand by a notary in the street of an acceptor of a bill is not a sufficient demand. It should be made at his place of business.

77. A demand and notice of the non-payment of a negotiable note may be waived on or before the day of maturity by the indorser, either orally or in writing, or by acts having the effect to mislead the holder and prevent him from treating the note as he would otherwise have done. Having waived this right, an indorser is put in the same position as though the protest had been made and a notice had been duly given to him. A drawer who promises to pay a bill, after full knowledge of the fact of an omission to make due present-

ment, thereby waives it and becomes bound, and his promise may be express or implied from circumstances. The words, "protest waived," are regarded everywhere as a waiver of both demand and notice. In one of the cases the court remarked that a waiver of protest before the maturity of a note is a waiver of all the steps leading to it and includes demand and notice of non-payment.

78. The transfer of paper by indorsement after it has matured has not the same significance as a transfer before maturity. By such a transfer the indorser simply conveys his interest in the note or other instrument, and the indorsee takes it subject to the same defense as might have been made had it remained in the possession of the payee. The reason is that its non-payment is a fact of so much importance that he should inquire why it had not been paid.

79. The indorsee takes such a note on the credit of the indorser, who is liable only on proof that a demand has been made of the maker within a reasonable time, and immediate notice has been given of the default. He is as much entitled to a notice of demand and non-payment as an indorser before its maturity.

80. Promissory notes originate in two ways; they are issued either in payment of merchandise or other property, or for the purpose of borrowing money on them. Those which have their origin

in business transactions are called business or commercial paper; the other kind of note is known as accommodation paper. This is made by an agreement between the maker and payee, who is also the indorser, for the benefit of one of them.

81. The maker's promise or undertaking is to pay his note to any holder at maturity. He is liable, except to the payee, like the maker of any other paper. The indorser promises, in effect, that if the maker does not pay his note at maturity, he will do so as soon as he has received due notice of the maker's failure to fulfil his promise. Very frequently accommodation notes are made for the indorser's benefit, and when they are, he must pay them. In other cases, as the maker has received the proceeds, he is responsible therefor, and the indorser can recover from him whenever he has been obliged to pay them.

82. As accommodation paper is made for the purpose of borrowing money, it must necessarily pass into the possession of a third party. The indorsee acquires as good title, and in every respect his rights are as perfect, as those of the indorsee of commercial paper. The maker, therefore, cannot successfully defend against the indorsee that he is not the owner, and gave no consideration therefor, or that he knew its real character. The indorsee is no more required to prove the consideration paid by him than he is in other cases.

83. An accommodation note given to a party for his use, without any restriction, can be pledged as security for a debt, and the maker is cut off as completely from making defenses against the person to whom it has been pledged, as the maker of ordinary business paper is against the indorsee. Said an eminent jurist: "He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequence, and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it in any other way."

CHAPTER X.

CHECKS.

1. Additional marks or abbreviations do not qualify a drawer's liability.
2. The law presumes that a check is given in payment of a debt.

When the giving of a check does not transfer a deposit, the holder cannot sue the drawee for the amount.

4. Cases in which a check does transfer a deposit.
5. A drawer may stop payment of his check.
6. A check must be immediately presented.
7. A check is not due until payment is demanded.
8. If a drawer has no money his check is a fraud.
9. If payment is refused the holder should protest the check.
10. If this is not done the drawer is still liable unless he has suffered from the delay to present it.
11. A check may be certified.
12. A check drawn in an unusual manner should not be.
13. Post-dated checks.
14. Effect of clearing-house regulations concerning checks.

1. As checks are the most common of all instruments in commercial business, some principles will be given relating to them in addition to those contained in the previous chapter. Like every other instrument, a check must be properly

signed. The addition of the letters Fr. to a drawer's signature would not qualify his direct and personal liability. The law would regard them as meaningless hieroglyphics.

2. The law presumes that a check is given in payment of a debt, or for cash, and is evidence of the fact whenever the drawer had funds in the drawee's possession. When checks are taken by a creditor from his debtor received by the latter from another, the law presumes that they were accepted as conditional payment, and not as a satisfaction of the debt. And this presumption can be overthrown only by clearly showing that they were accepted as cash, or that an agreement existed to receive them as unconditional payment.

3. In nearly every state, a bank on which a check is drawn is under no legal obligation *to the holder* to pay or to accept it, whether the maker's funds are sufficient for this purpose or not. In the states especially of Illinois, South Carolina and Kentucky, the effect of giving of a check to a person is to transfer the amount of the maker's deposit therein specified, and the checkholder can sue the bank for the same whenever payment is declined. But in the states where this rule does not prevail, the holder of a check cannot recover from the bank on which it is drawn unless the institution has accepted it. A bank should not delay long either to pay, or to accept, or to refuse payment. It is not right to keep a check for

several days and then refuse to pay. While this is the most general rule existing between *banks and checkholders*, these institutions have well defined duties to perform for those who properly draw checks on them. Their orders must be observed; and if a bank should decline to pay a check drawn on a sufficient fund belonging to one of its depositors, without a justifiable reason for so doing, the institution would be liable for whatever injury the depositor sustained in consequence of its action to execute his order or direction. For example, if a bank should decline to pay a check supposing that the maker's deposit was insufficient, when in truth it was ample, the institution would be liable for the consequence of dishonoring his order, even though its conduct was founded on the mistaken calculations of a book-keeper.

4. Though a check drawn in the ordinary form transfers no title to a bank deposit, it does effect a transfer whenever it is drawn for the whole amount due to the depositor. Then, indeed, the legal title is completely transferred on the delivery of the check even against the drawer; but if only a part is included in an order, it will not have that effect unless it is accepted by the drawee.

5. A drawer may stop the payment of his check. This is usually done by giving a notice to the bank on which the check is drawn. After receiving such a notice, it can only pay at its peril.

6. A check is designed for immediate presentation. The holder, therefore, should present it for payment as soon as he reasonably can, and if he does not, he retains it at his own risk. Consequently, when a loss occurs in consequence of his negligence to present it, the check operates as payment. Delay in presentation, however, does not discharge the drawer unless he has been injured. Two rules have been established concerning the time for making presentation, that may be repeated: If the holder and drawer live in the same place, the holder should present the check on the day it is received or the following day; and when it is payable at a different place from that in which it was received, the check should be forwarded by mail on the same, or the following day for presentation.* If not thus presented or forwarded, the risk of the solvency of the drawee is assumed by the payee.

7. A check is not considered due until payment is demanded, and in this regard differs from a bill of exchange or note, which is payable on a particular day. Consequently, the receiving of a check a few days after its date from the payee does not, like the receiving of an overdue bill, subject the holder to the objections that might have been raised by the drawer against the payee. A delay of two or three days is not enough to put the receiver on inquiry concerning the considera-

* See Chapter IX, Sec. 47, p. 169.

tion for which the check was given, nor subject him to defenses that might exist between the drawer and payee. Yet a check may be retained so long after its date without presentation as to cast discredit thereon; and when a check is presented for payment in a discredited condition the drawee bank should not pay it, and if it does, the check cannot be charged to the depositor's account. Again, when an overdue check is taken, this is done on the credit of the indorser, and is subject to the equities or defenses existing between the original parties.

8. The drawing of a check on a bank in which the drawer has no funds is a fraud, both on the person to whom it is given and on the bank. And the holder is also guilty of fraud should he present it for payment, knowing that the drawer has no funds to pay it; and in such a case if it is passed to the holder's credit and charged to the drawer, this is not payment and the holder cannot recover the amount from the bank.

9. If payment is refused, the holder should protest the check and notify the drawer as well as the indorsers, if there are any, whom he intends to hold for payment. If, however, the drawer has no funds in the bank at the time of drawing the check, presentment and notice are excused.

10. Nevertheless, the consequences of not presenting a check within the proper time and notifying the drawer if it is not paid, are not the same

as the consequences to the drawer of a bill from the holder's neglect to present it at the proper time to the acceptor for payment. If this is not done by the holder of the bill, the drawer is discharged. His liability is the same as that of an indorser. He promises to pay if the bill is properly presented to the acceptor and is not paid, and notice is given to him of the fact. But the drawer of a check is not discharged by neglect or delay to present it for payment, unless he has been injured by the holder's remissness. He is still liable, because he is the primary debtor, unless he can show that he has suffered by the delay. The law though presumes that in some way he has been injured, and consequently the holder is obliged to prove that the drawer has not lost anything in order to recover the amount due.

11. Checks are frequently certified. In doing this the title to so much of the maker's deposit as is specified therein is transferred to the holder, who thereafter is a depositor having the same rights as any other. The holder of such a check should present it promptly for payment, or he must sustain the loss should the bank fail; and if it should pay the amount of a certified check long afterwards to the original depositor, supposing that the true owner had disappeared, though requiring a bond of indemnity from him, this would be an acknowledgment that it belonged to the other.

12. A cashier is authorized to certify only those checks that are drawn in the usual manner. A bank would not, therefore, be liable on a certified check containing an unusual stipulation. But when a cashier or other employé of a bank is authorized to certify the checks of drawers having sufficient funds, his transgression of instructions will not relieve the bank from responsibility to an innocent holder.

13. Sometimes checks are post-dated; that is, on a later day than the one on which they were actually written. The object of thus dating them is to obtain delay in making payment, as the drawer simply undertakes to have the money in the drawee's possession on the day specified. If a bank fraudulently pays an altered post-dated check before its true date, it cannot be charged against the drawer. In no case can such a check, if it is paid before the time specified, be charged to the drawer's account.

14. If a rule exists among clearing-house banks that checks received through the institution for payment may be examined and returned by a specified time, entries of them made by the drawer of the receiving bank previously to that time, or cuts or other marks on the checks, will not prevent their return, or operate as an acceptance or payment of them.

CHAPTER XL

GUARANTY.

1. What is a guaranty?
2. The promise must be to pay another's debt.
3. What language must be used to describe a guaranty?
4. It must be accepted.
5. The claim must be presented against the debtor before proceeding against the guarantor.
6. The limit of the guarantor's liability.
7. When he can revoke his guaranty.

1. A contract of guaranty is an acknowledgment or promise for another. An obligation is created to pay if the person who is guaranteed, called the principal, is unable to recover the money due from the debtor. He must, therefore, bring an action within a reasonable time after the maturity of his claim against the primary debtor, and duly prosecute the same, except in cases in which nothing could be recovered were the attempt made.

2. By the statute of frauds a guaranty must be in writing. The promise to pay must be proved by clear and satisfactory evidence. But it is not always easy to decide whether a promise relating to the debt or liability of a third person is, or is

not, such an one as the statute requires should be in writing. When the promisor's chief purpose is not to be responsible for another, but to serve his own purpose, his promise need not be in writing, though the ~~promise in form~~ is to pay the debt of another.

3. What language ought to be used to describe a guaranty? On one occasion Chief Justice Gibson declared that warranty and guaranty signified the same thing, "the one usually, but not always, denoting a covenant in a conveyance, and the other denoting a parol promise." "I hereby guarantee the payment of the within certificate," is a guaranty; so is the form, "I hereby guarantee payment of the within note without protest." But "for a consideration received I hereby agree to become security for the faithful performance," etc., is a contract of surety. And an order, directing a person to give the bearer goods to a specified amount on the holder's account, would render the person who gave it liable as a principal and not as a guarantor. A stipulation in an agreement for the sale of goods, that a part of the purchase money shall be paid in "good notes," is no guaranty of the solvency of their makers.

4. To become binding a guaranty must be accepted, and notice of the acceptance must be given to the guarantor unless the act of guaranteeing is followed by an immediate acceptance. Likewise,

a guarantor of future credit is entitled to notice from the party giving the credit that he has been accepted, unless the creditor's offer and the guarantor's acceptance are at the same time. But a direct promise to guarantee future indebtedness does not require an acceptance. For example, a guaranty of existing and future indebtedness, "unconditionally at all times," and a promise to sign a note for a purpose that is mentioned. Another guaranty of this character requiring no notice was thus expressed: "If A purchases a case of tobacco on credit, I agree to see the same paid in four months." And on another occasion the guarantor wrote: "Give A a little more time and I will see that you get your money."

5. The law implies the due prosecution of the claim against the debtor by the party holding the guaranty, and his failure to collect of him, before he can call on the guarantor. In other words, before the creditor can enforce his guaranty he must show that he has exercised due diligence to obtain payment from the principal. Whether he has been reasonably diligent or not is a question of fact that must be determined like any other whenever it arises.

6. A guarantor cannot be held for a larger amount or longer time than the original debtor. When his liability ceases so does that of his guarantor. Nor can his liability be extended in any manner without his consent.

7. Often, but not always, a guaranty can be revoked. If it relates to an unfinished transaction this cannot be done. Nor can a guarantor do so when he has received a consideration for guaranteeing which he retains. An illustration may be given of this principle. If a person has guaranteed the payment of goods to a specified amount, and after a portion has been delivered desires to revoke his guaranty for the remainder, he can do so unless he has been paid for guaranteeing the entire amount. There may be cases in which he could not do this even without regard to the consideration paid to him. If a seller, for example, relying on a guaranty, had ordered goods specially, and was liable for them, he could insist on delivering them and require the guarantor to fulfil his contract.

CHAPTER XII.

SURETY.

1. The distinction between a guarantor and a surety.
2. The distinction is sometimes difficult.
3. A surety ought to know the nature of his undertaking.
4. A creditor is not required to give a surety notice of non-payment.
5. The note must be due before a surety can give notice to collect it.
6. The notice should be in writing.
7. When a notice has been given the creditor should not delay to collect.
8. If more time is given to the debtor the surety is discharged.
9. The rights of parties to a security given for the surety's benefit.
10. Liability of a surety incurred through an agent.

1. The contract of suretyship is an original undertaking, and the person who guarantees or becomes a surety is called by that name, while the person for whose benefit the contract is made is called the principal. The surety is bound to the full extent of the principal's liability. The contract of a surety in one respect is similar to a guarantor's, but differs from that of an indorser. The latter undertakes to pay after he has re-

ceived notice of a demand and non-payment by the maker, while no demand and notice are required to hold a guarantor or surety. But a guarantor's liability does not become absolute until the creditor has exhausted legal means to collect of the debtor; while a creditor to whom one has become a surety is not obliged to resort to any legal means against the debtor, unless he is notified to do so by the surety, to establish his right to proceed against the surety himself. It is true that the creditor usually seeks to collect first of the debtor, but, instead of doing so, he may proceed against the surety. This a guaranteed principal cannot do except in those cases in which nothing could be recovered from the debtor, for the law does not require him to prosecute a useless action.

2. While there is a difference between the liability of a surety and that of a guarantor, it is not always easy to determine by the agreement which liability is assumed. On one occasion the owner of a judgment "guaranteed payment thereon in one year from date." He was regarded as a surety, and as the time of payment was extended without his consent he was discharged. On another occasion the indorsement on an order, "I hereby become security for C for the fulfillment of the within obligation," created a contract of suretyship. Again, by the following indorsement the signer was declared liable as a surety, "I

hereby acknowledge to be security for the within amount of \$5000 unless satisfactorily paid by W. A." So were the following indorsements: "I will see the within note paid;" "guarantee payment when due;" "agree to its terms." The promise or contract of suretyship must be in writing to comply with the statute of frauds.

3. A surety ought to understand the nature of his undertaking, and if a note is taken to a person to sign in that capacity, which is irregular in form, he should make inquiry concerning the prior parties and the purpose of it. If he does not, he cannot ask to be relieved therefrom should one of the makers who had signed it by mistake be subsequently released. Nor can a surety on a note be relieved from liability to the holder who has taken it for a valuable consideration by showing that his instructions relating to the completion of it were not followed, for as the surety has created confidence by putting the note, though incomplete, into the debtor's hands, he must suffer the loss that befalls an innocent party.

4. A creditor is not required to give notice to his surety of the non-payment of the note at its maturity, nor to display any diligence in recovering from the debtor before proceeding against the surety himself. Consequently a surety is not discharged by the creditor's omission to bring an action against the principal debtor. But if a surety, or one properly authorized for him, gives

his creditor a positive and clear direction to sue the principal debtor at a time when the debt can be collected, which is disregarded, the surety will be released.

5. The note or other obligation must be due before the notice can be given. A notice, therefore, by a surety on a note not yet due that he will not remain responsible if the holder does not sue the principal debtor as soon as the debt becomes due, or that he must get other security, will not discharge the surety.

6. Formerly, the notice need not be in writing, though this was always regarded as better evidence, but in some states a statute has been enacted requiring a written notice.

7. When a creditor has been notified, he must not only begin his action against the principal immediately, or without any unnecessary delay, but must prosecute it with all reasonable diligence. So long as a creditor is not notified, his silence can never affect his remedy against the surety. Mere forbearance or delay, however injurious to the surety, will not discharge him.

8. If, for a consideration, more time is given to the principal debtor to pay, without the surety's consent, who is thereby prevented from proceeding against the debtor, he is discharged. A surety often escapes through the creditor's forgetfulness or disregard to obtain his acquiescence to an extension of the time of payment given to the

debtor. Doubtless in most cases a surety would readily consent, but he is not asked, the extended time expires, the debtor does not pay, and the surety is released.

9. Having shown the nature of a surety's undertaking and when he is discharged therefrom, we shall next consider the rights of parties to the security often given to secure a surety. And first, a security held by a principal who is paid by the surety passes to him for his protection. If, for example, a mortgage has been given to a creditor as security who is paid by the surety, he is entitled to the mortgage. Again, a creditor is entitled to the security held by a surety for his indemnity, or for the payment of his debt, even though he may not have known of it at the time.

10. Sometimes the obligation of a surety is incurred by the request or solicitation of an agent. Whenever this is done and the surety pays the debt for the principal's benefit, he is answerable to the surety. And if the secretary of an association has induced a person to become a surety on a note, it cannot repudiate the secretary's authority and yet retain the benefit of his act.

CHAPTER XIII.

PAYMENT.

1. Payment can only be made in cash.
2. What is meant by a tender?
3. What kinds of money are a legal tender?
4. Why are not all kinds?
5. Effect of tendering payment though not accepted.
6. A creditor cannot afterward take advantage of an informality.
7. A lawful tender and payment into court is a good defense.
8. A note or check is not absolute payment.
9. Whether it is payment is a question of intention.
10. Is the note of a third person payment?
11. A creditor should be diligent in collecting a check.
12. What a creditor can do when a check taken by him is not paid.
13. Application of money when the debtor owes several debts.
14. Application by a bank of a customer's deposit in payment of his note.
15. If it is indorsed the bank must apply it in payment.
16. Unless the depositor has appropriated it.
17. What can be done when the deposit is insufficient?
18. Where shall payment be made?
19. To whom shall payment be made?
20. Effect of part payment.
21. Effect of a discharge under seal of a debt partly paid.

1. Many questions may arise concerning the mode of making payments. What is a legal payment, and how can it be made? Parties may agree to any mode of payment they please, and agreements are often made by them. The amount may be paid in money, or by a bill or note. Unless an agreement is made, the only payment known to the law is cash. This a debtor must pay when it is due, or at least he must tender the amount due to his creditor.

2. What is meant by tendering payment? It means the offering to one's creditor in legal money the amount due to him. Not every kind of money can be used in making a tender. First of all, cash can be used for this purpose, by which is meant gold or silver.

3. Silver coins, except the dollar, are a legal tender only to the amount of five dollars, and the minor coins, the five and one cent pieces, to the amount of twenty-five cents. There are many kinds of paper money, national bank notes, United States notes, silver certificates and gold certificates. Only one kind can be used in making a tender in all payments—the notes issued by the United States government, and commonly called legal-tender notes. National bank notes are a legal tender to the government, but cannot be legally tendered in payment of a debt by one individual to another.

4. Why has not a national bank note the same

legal tender power as a United States note? The answer is, because Congress has declared what notes shall be a legal tender and what not. As none of the notes issued by the national banks are legal-tender notes, a creditor can refuse to take them, and if such notes are tendered to him, and he declines to receive them, the law does not consider that any money whatever has been tendered to him. The law must be followed in making a tender of money. If it is not, if the proper kind of money is not selected and used for this purpose, then the law regards a debtor as not having offered to pay his debt: and if his creditor should sue him for the amount he could not claim or defend that he had paid it, or made a legal effort to pay it.

5. Whenever a debtor has offered to pay his debt in lawful money, such as the law regards as a legal tender, then his creditor, should he sue for the amount, could not recover the costs of his suit, but simply the money that was offered or tendered to him. This is why it is needful to be so particular in tendering the proper kind of money. One may ask, is not a national bank note for five hundred dollars worth as much as a United States note of a similar denomination? Unquestionably, but if one desires to tender payment of his debt he should use United States notes, because the law recognizes them as a proper kind of money for discharging a debt, while bank

notes are not thus regarded. A tender, therefore, of national bank notes would be useless.

6. Generally, if a tender be refused for any specific reason, the creditor cannot afterwards take advantage of any informality to which he did not object at the time the tender was made. A tender may be made of a larger sum than is due, but if the debtor should require a repayment of the balance, the tender would not be good. Furthermore, there must be no condition at the time of making a tender, not even that it shall be received as the full amount due, nor can a receipt in full be demanded, but a receipt for the amount tendered or paid may be.

7. A lawful tender and payment of the money into court is a good defense for a debtor whenever he is sued. In other words, if he should tender the money, and it should be declined, he might pay it to a proper officer of the court; and if he did so and afterward was sued, having fulfilled his whole duty to the creditor, nothing could be recovered. The creditor, however, might break down this defense by proving, if it were the fact, that after the money had been thus paid to the officer, he demanded it of the debtor, who refused, as he ought not to have done, to pay.

8. A note or check given for a bill or other obligation is not an absolute payment. It is of no higher character than the note itself, which is not money. Again, if a note has been given after

the accounts between two parties have been settled, it is evidence of the settlement, but is not payment of them. But in every case it is payment if the parties agree that it shall be. Unless such an agreement is made, the note or check is conditional payment only, and remains so until the note or check is paid. When this happens, then the bill for which the note or check was given is regarded as paid, but not before.

9. Whether the note, check or other instrument is to be considered as payment or not is a question of intention. Unless this is clearly proved the instrument does not operate as payment.

10. When the note of a third person is transferred to a creditor, is this payment of the debtor's debt? It is presumed to be payment when this is understood by the parties by giving the debtor credit for the amount. When a debtor indorses such a note, his liability is simply that of an endorser, and he can be held liable only in that capacity.

11. A check is often given in settlement of an obligation. When it is, the receiver has a distinct duty to perform. He should present it within a reasonable time to the bank on which it is drawn for payment. If this is not done, and the bank should fail, the person holding it would be the loser. The debtor has given him an order on a bank in which he has money, and it is the creditor's duty to collect it in a reasonable time. The

debtor should not always be liable for the money, and if the creditor is negligent in not collecting the order or check, there is no reason why the debtor should continue to be bound for the amount.*

12. When the check or note thus given is not paid on due presentation, the creditor can collect the original debt if he desires, as this remains against the debtor as though no note or check had been received.

13. If one owes several debts to his creditor and makes a general payment, the question sometimes arises how shall the money be applied. First, the debtor can designate how it shall be, and if he does not, then the creditor can apply it to whatever debt he pleases; if he makes no application, then the law has established some rules on the subject that may be briefly given. These are, first, if the debts bear interest and none has been paid, the money must be applied first to that and then, if a balance remains, to the principal. If there are several items, the money must be applied to the oldest. Again, if there are several claims secured in different ways, the law applies the money to the oldest secured claim; and if a surety is holden on one of them, he may insist on the application of the money to the oldest claim, and should this be the one on which he is liable,

*See Sec. 6, p. 187, for the rules relating to the time when checks must be presented for payment.

and the amount be sufficient, he would be discharged. The money will not be appropriated in the way most advantageous to the creditor to the loss or injury of a surety; on the other hand, he cannot require a general payment to the last debt on which he may be holder regardless of the interests of the creditor.

14. The application by a bank of funds in its possession belonging to the maker of a note payable there, may next be considered. When his note matures and no other party is liable thereon, the institution may exercise its discretion in applying them. It may take the risk of collecting the note and permit the depositor to withdraw his deposit. Whenever the deposit is trust money, though deposited in an individual name, and this is known by the bank, it cannot be applied to the payment of the depositor's obligation.

15. If the note has been indorsed or guaranteed, the bank has no discretion, and must apply the maker's deposit on his obligation, though a neglect or mistake to do so does not relieve the maker from payment. This is quite similar to the rule that requires a creditor who has the means for paying his debt to apply it in this manner. The note is in effect a draft or order on the bank in favor of the holder and discharging the indorser. This rule, however, does not apply to a bank when a note payable there is presented after its maturity. Its payment is not required for

the protection of the indorser. If, therefore, no application of the depositor's money is made, the indorser is not discharged. Generally, a bank declines to pay a note that is presented overdue, but no prohibitory rule against doing so has been established except in those states, a few in number, in which a bank is forbidden from paying the notes of its depositors without specific direction.*

16. When a depositor has made a special application or appropriation of his deposit and has notified the bank of his action, it cannot charge off a note against his deposit, for a man may do what he will with his own so long as he retains control over it.

17. Again, if the maker's deposit is insufficient for this purpose must the bank apply it in part payment of his obligation? Perhaps the same rule should be applied to a note that is applied to a check, the deposit can be paid whenever the holder is willing to receive the same.

18. The next question to be considered is, where shall payment be made? In promissory notes the place of payment is often mentioned. If the maker of the note is at the place mentioned during business hours of the day of payment and the creditor is not present, all persons who have indorsed it are discharged, but the maker will remain liable. Thereafter the debt will be re-

* See 1 Dan. on Neg. Inst., Sec. 326b for authorities.

garded as payable at the payee's residence, or wherever he may be found by the maker. The maker's liability is the same as it would be on a note payable on demand, having no place of payment specified. If no place of payment is mentioned, payment must be made at the residence or place of business of the creditor. It is not the creditor's duty to find his debtor and demand payment; on the other hand, the debtor must find the creditor and pay him.

19. Next we may inquire to whom payment may be made. First, we remark, to an attorney who is employed to collect the debt. This, however, does not necessarily justify payment to the attorney's agent. Secondly, payment may be made to any agent of the creditor who is authorized to receive payments in the ordinary course of business, or to a person who appears to be authorized to do the creditor's business, who has his papers, and whom the creditor permits to assume such appearances. Thirdly, payment may be made to a trustee, or to one of several executors. Fourthly, payment may be made to one of several partners. Payment may be safely made to one even when the other partners have forbidden the debtor to pay him.

20. What is the effect of part payment? If this is done before a debt is due and received by the creditor by agreement that it shall be in full discharge, it is effective. The receipt also of

something beside money in satisfaction of a debt, though apparently inadequate in value, is a good payment. So is the acceptance of a new security, though for a less amount, if this is agreed to be in full payment of the debt.

21. Again, when a part of a debt is only paid in money and the creditor gives a discharge under seal of the whole debt, he cannot collect the balance. In some states it has been questioned whether, if such a discharge or receipt is given without a seal, the debt is paid. The reason is that a payment of only part of the money cannot properly be deemed a consideration for the discharge of the whole debt. But a release or a receipt therefor under seal by the creditor, even though it be of a part, for the whole, will be effective; and in some states, even though the receipt is not under seal, it discharges the debt.

CHAPTER XIV.

INTEREST.

1. What is usury.
2. Modification or repeal of usury laws.
3. Penalty for taking more than the legal rate.
4. The tendency is to diminish the penalty.
5. Double ground on which interest may be demanded.
6. On what debts interest is allowed.
7. The same subject.
8. When interest begins on a note payable on demand.
9. Modes of escaping usury.
10. Notes purchased.
11. Difference between discount and interest.
12. The legal rate when parties live in different places.
13. What rate can be collected when no place of payment is specified in a note.
14. Interest on notes and other obligations paid in installments.

1. Interest means the payment of money for the use of it. In most civilized countries this is regulated by law. It declares how much money may be paid and received for the use of money, and is called legal interest. If more is paid, or an agreement is made to this effect, it is called usurious interest. By interest, therefore, is commonly meant legal interest, and by usury, usurious interest. Formerly the regulations concern-

ing the rate of interest were more strictly enforced than they are at the present time. In the early centuries the church was opposed to the payment of interest, for it was contended that as money had no earning power, nothing ought to be paid for its use. The fallacy in this reasoning was long ago discovered. Money is borrowed for the purpose of doing something with it, buying goods, building houses and the like, and in these uses of money there is a very distinct gain to the borrower. Consequently, he may be justly required to pay for the use of it.

2. One consequence is that the laws on the subject of usury have become greatly modified in all the leading countries of the world. Many have contended that there ought to be no legal regulations whatever on the subject, and that lenders and borrowers ought to be as free to make bargains concerning the use of money as they are in selling corn, potatoes or other commodities. Why should the law fix the reward to be paid for the use of money, while the law is silent concerning all other things? This view has spread so widely that the laws have been greatly modified of late years in this country in the direction of permitting persons to make whatever contracts they please. In some states the laws have been entirely repealed. In New York, for example, borrowers and lenders are free to make the rates on sums exceeding five thousand dollars, while on

smaller loans a maximum rate still exists beyond which the parties are not permitted to go. This law is enacted, or supposed to be, in the interest of the borrower. In some states savings banks only are restricted in lending money. Connecticut furnishes an example of this kind. Everywhere a rate is fixed by law that must be paid whenever an obligation bears interest and the parties themselves have fixed no rate.

3. When more than the legal rate is taken, as both are parties to the transaction, neither ought to suffer in consequence of the conduct of the other. This feeling has become so general that only now and then does a borrower attempt to enforce the law against the lender. He well knows that public sentiment is opposed to him, and cases are occurring constantly in which higher rates are paid than are permitted by law. Neither party, however, supposes that advantage will be taken of the law to recover the excess of interest or other penalty incurred by the lender, and the occasions are rare, indeed, in which an appeal to the law is ever made.

4. The tendency of the law has been to diminish the penalty for taking usury. There was a time when the lender forfeited all the interest as well as the principal whenever he made a loan of a usurious character. Now, the penalty, in most states where a usury law exists, is only the forfeiture of the interest, or of the excess beyond the legal rate.

5. Interest may be due and demanded by a creditor, either because the debtor has agreed to pay it, or because the creditor has sustained a loss for withholding money that is due. Indeed, it is a well-known rule of law that whenever money is withheld which is clearly due, the debtor is regarded as having promised legal interest for the delay. The usage of trade and the customary course of dealings between parties have great influence in these matters. Thus, in New York the courts long ago decided that when a buyer knew that it was the uniform custom of the seller to charge interest on articles sold or manufactured by him for a certain time, he could charge interest on them.

6. In general, interest is allowed on a debt that is due by a judgment of a court; and on a settled account from the day of settlement; on goods sold from the time of the sale, if no credit has been given, and if there has been, then from the day of expiration of the credit; for rent from the time it is due; also for money paid to another or lent to another, from the time of paying or lending it.

7. Many questions have been raised with respect to the collection of interest on various kinds of debts. Besides those mentioned, a few others may be noticed. For example, a city is not liable for interest on its bonds after they have matured if it has provided the funds to meet them at maturity. It is not required to seek the holder

and tender the money to him. On the other hand, it is his duty to demand payment when the obligation expires. If he does not do so, there is no reason why the city should be required to pay anything in the way of continuing interest.

8. It sometimes happens that money is due, but is not payable, and when this happens interest does not begin until the money is demanded. Thus if a note be on demand, the money is always due, but it is not payable until the holder demands it, and therefore it does not draw interest until he has demanded payment. But when a note is payable at a certain time, or after a certain period, it carries interest from that time, whether it is demanded or not.

9. There is no special form or expression necessary to make a bargain usurious. Formerly, when the usury laws were more generally enforced than they are now, there were various methods adopted for evading the law. One of the most frequent ways in borrowing from banks was to agree that a considerable portion should remain on deposit. Of course, the effect of this was really to borrow a much smaller sum than that on which interest was paid. It was very difficult to trace usury in this proceeding. Another common way was to solicit a loan through another person to whom a commission was paid that was divided between the solicitor and the lender. In this way the lender received a larger sum for the use of his money than the rate of interest specified,

10. Often this question was raised when notes had been sold to a third party. Of course, the owner of a note had a good right to sell it for such a price as he pleased, and when this was done in good faith, in other words was a real sale, there was no taint of usury in the transaction. But sometimes a sale was made merely for the purpose of obtaining a higher rate of interest than the legal one, and then the transaction was tainted with usury. Usually if any person makes his own note and sells it for what he can get, this, though a sale in appearance, is in fact a loan. And if the apparent sale is for such a price that the seller pays more than legal interest; in other words, if the note bears interest and is sold for less than its face, or is not on interest and more than interest is discounted, then the transaction is usurious. In the one case the transaction is legal and proper; in the other it is not.

11. It may be remarked that banks, in discounting notes, do not actually discount them, but simply collect interest on the money loaned in advance. In discounting a note such a sum is given to the borrower as will, at the end of a specified period, at an agreed rate of interest, amount to the sum he is to pay at the end of that period. Suppose one wished to have a note discounted for a hundred dollars at a bank, payable in one year from date, what would the bank do? If the legal rate was six per cent., the bank would

return \$94.00 to the borrower, expecting, at the end of the year, that he would pay one hundred dollars. Suppose the bank should agree to *discount* the borrower's note for that period at six per cent. interest, what would the borrower receive? Something more than \$94.00, for the reason that this sum at six per cent. would not amount to one hundred dollars at the end of the year. The bank must give him \$94.34, for the reason that this sum at six per cent. interest would only amount to one hundred dollars at the end of the period. The taking of interest, however, in advance, although it is not true discount, for a long period has been regarded as legal. The question was raised in the courts of New York in the early part of the century, and was thus decided.

12. With respect to the rate of interest, the rule prevails everywhere that the parties may contract for the rate that prevails at the place where either party resides. Thus, if a lender resides in Ohio, where the legal rate is six per cent., and the borrower lives in Iowa, where the legal rate is eight per cent., a contract would be legal specifying the higher rate of interest.*

*If a bill or note bears usurious interest both by the law of the place where it was made and of the place where it was payable, the legal consequences of disregarding the law of both places to be visited on the offender are those of the place where the instrument was made. Again, it cannot be

13. A note not made payable anywhere is payable at the place where it was made, and bears the rate of interest established by the law of the place of its birth. Generally a note is made payable at a particular place, but not always. When an omission occurs, then this rule should be applied to determine where it is payable, and also the rate of interest that must be paid.

14. When a note, bond or other security is paid in installments, the interest may be computed in three ways. One way is to compute interest on the whole sum to the day of payment, and also on each installment from the time it was paid to the day of making the final payment; and the difference between the installments paid and the interest thereon, and the principal sum and interest on it, is the amount due. Another way is to compute interest on the whole sum to the time of

made payable in a particular place, where the rate of interest is higher than in the place where it was made, merely for the purpose of evading the usury law. In the case of *Akers v. Demond*, 103 Mass. 324, Mr. Justice Wells remarked: "It has often been held in states where restrictions upon the rate of interest are maintained, that it is not usury to charge upon negotiable paper whatever is the lawful rate of interest at the place where the paper is payable, although greater than the rate allowable where the negotiation takes place. But if the paper is so made for the purpose of enabling the larger rate to be taken, or the greater rate is received with interest to evade the statutes relating to usury, and not in good faith, it is held to be usury."

the first payment and add this to the principal, and then deduct the installment; repeating the operation whenever an installment is paid until the time of final payment. The objection to this way is, if an installment is not equal to the interest earned and computed on the principal sum at the time of paying the installment, interest thereafter is earned and computed on interest, and the creditor therefore receives compound interest. To obviate this objection, the third way is to compute the interest on the principal sum from the time when interest became payable to the first time when a payment or payments with the interest computed on them shall equal or exceed the interest due on the principal. Then this sum is deducted therefrom, and future interest is computed in the same manner as before. By this way payments are applied first to reduce the interest, and secondly, to diminish the principal of the debt; and the creditor does not receive compound interest. Many, if not all the states, by statute have established a mode of computing interest on obligations paid by installments.

CHAPTER XV.

SHIPPING.

1. A ship is personal property.
2. The law relating to registration.
3. Special regulations.
4. Exclusive privileges.
5. How a vessel may be transferred.
6. What passes by the word ship in selling her.
7. When is a person a purchaser who pays in installments.
8. Part-owners.
9. They are not partners.
10. A majority may direct concerning its employment.
11. The ship's husband.
12. When his authority binds all.
13. Pledge of a ship for borrowed money.
14. Same subject.
15. Employment of a ship.
16. Different senses in the use of "freight."
17. The sending and receiving parties.
18. Nature of a bill of lading.
19. Delivery of freight to the consignee.
20. How far is a bill of lading binding.
21. Nature of the lien for freight-money.
22. When the lien is destroyed.
23. The contract is for carrying all the goods.
24. The consignor is not liable for the freight-money.
25. Payment of freight-money in advance.
26. Recovery of an excessive payment.

27. Recovery of freight-money after the sale of a ship and the beginning of a voyage.
28. To earn freight-money the voyage must be legal.
29. The shipper or consignee cannot abandon the goods.
30. The law relating to passage money.
31. The letting of a ship.
32. Nature of a charter-party.
33. What the hirer may do with a ship.
34. The voyage may be double and the liability in such a case for freight-money.
35. Time and demurrage.
36. For what demurrage is due.
37. How the contract may be dissolved.
38. The navigation of a ship.
39. Beyond his ordinary authority a master can act only from necessity.
40. A master may substitute another for himself.
41. He has nothing to do with the cargo.
42. The owner is not responsible for the wrong-doings of the master.
43. Liability for collisions.
44. Seamen.
45. Their lien for wages.
46. Provisions; when double wages are given.
47. How their complaint of the ship's unseaworthiness is treated.
48. A ship must have a medicine chest.
49. A seaman's right to be brought back.
50. The rights of persons who repair and furnish supplies.

1. A ship is personal property, and her ownership and transfer are regulated in this country by rules similar, in some respects, to those that apply to real property. The Federal constitution authorized Congress to enact laws for regulating

commerce. Accordingly, in 1792 an act was passed for registering the names of the owners of ships and for navigating them.

2. By this act an American vessel may be registered in the custom house. The law does not say that a ship must be registered, but the disadvantage of not doing this is so great that all vessels are registered. The ships that may be registered are those built within the United States and that are owned wholly by citizens, as well as some others that need not be mentioned. No ship can be registered if the owner or a part owner resides abroad, although he is a citizen, unless he is a consul of the United States, and an agent for, or partner in an American mercantile house. The master must also be a citizen of the United States. The law also declares that if the owner or part owner is a naturalized citizen and resides in the country whence he came more than a year, or in any foreign country more than two years, the vessel cannot be registered unless he is a consul or public agent of the United States. But a ship that has lost the benefits of registry by the non-residence of an owner may be registered anew if she becomes the property of a resident citizen by actual purchase.

3. Sometimes Congress by special acts permits the registration of a vessel as an American ship that has become so by purchase. If a registered American vessel be sold or transferred, the certifi-

cate of registration must be delivered up or the vessel is forfeited. As soon as a registered vessel arrives from a foreign port her documents relating to ownership, freights, etc., must be deposited with the collector of the port to which she has come, and the owner or master must make oath that the register contains the names of all persons who are then the owners of the ship, and at the same time report any transfer that has been made within his knowledge since the registry was made, and also declare that no foreigner has any interest in the ship. If a register were issued fraudulently, or with the knowledge of the owners, for a ship that was not entitled to one, it would be void and the ship would be forfeited. If a new register is issued, the old one must be surrendered. If a ship is transferred while at sea, the old register must also be given up, and all the requirements of law concerning registry must be fulfilled within three days after her arrival at the home port.

4. Exclusive privileges at various times have been granted to registered vessels of the United States. A ship that is not registered nor licensed can sail on no voyage with the national protection. If she engages in foreign trade or the coasting trade, or fisheries, she may be forfeited, and if she has foreign goods on board must also pay the tonnage duties that are levied on foreign ships. It may be remarked that every ship engaged in honest business, belonging to a civilized people,

has regular papers showing her nationality, unless they have been accidentally lost.

5. The statute relating to registration also provides how a vessel may be transferred. Whenever a sale or transfer is made, there must be an instrument in writing of the nature of a bill of sale. A mere oral transfer, even though there was a valuable consideration, and followed by possession, would give the transferee no right to claim a new registry setting forth his ownership. By a statute passed in 1850, no bill of sale or other conveyance is valid, or affects any person except the seller, unless it is recorded in the office of the collector of customs where the vessel is registered or enrolled. As a ship is personal property, the transfer should be accompanied by a delivery of possession. Actual delivery is impossible where a ship is at sea. In such a case, possession should be taken as soon as possible.

6. By the word ship, and still more by the phrase, ship and her appurtenances, or apparel, or furniture, everything passes connected with a ship and that is on board of her and fastened to her that is usual and needed for her navigation or for her safety.

7. Sometimes when a ship is building, payments are made by installments. If sums are paid from time to time that are deemed equivalent to the labor and materials used, the person thus paying is regarded as the purchaser; and if she is lost afterward, he is the loser.

8. Two or more persons may become part-owners of a ship in either of three ways. They may unite in building her, or may join in purchasing, or each may purchase his share independently of the others. In either case their rights and obligations are the same. If the register does not designate the proportions owned by each one, they are presumed to own the ship in equal shares.

9. Part-owners are not partners, but a ship may be owned in such a manner as to constitute all of the owners partners, and then the law relating to partnership will apply to the management of the ship. A part-owner may sell his share at any time to any one; and if he dies, his share goes to his representatives and not to the other part-owners.

10. A majority of them may generally manage and direct how the vessel shall be employed; but a proper court may interfere and do justice between them and prevent any part-owner from injuring the others. A part-owner, however, in the absence of the rest, may manage the ship both for himself and for them, and the contracts that he may make relating to its employment or care will bind the others. In general, every part-owner is liable for all the repairs of his ship, or for necessities that are supplied in good faith. It, however, a credit was given, or intended to be given to a part-owner personally, the others cannot be

held therefor. If goods are charged to a ship, or to a ship and owners, this would tend strongly to show that it was the intention of the person who supplied them to do so on the credit of all the owners. If, on the other hand, they were charged to one owner, this would prove that credit was intentionally given to him alone.

11. The ship's husband, as he is called, is the agent of all the owners for the management of the ship, and is usually a part-owner. He may be appointed by writing or otherwise. His duty is to provide for equipping and repairing the ship and taking care of her while in port. He also furnishes all regular and proper papers and makes contracts for freight or passengers, collects the receipts and pays the debts. He cannot, however, without special authority, insure the ship for the other owners, nor buy a cargo, nor borrow money, nor give up a lien on the cargo for the freight, nor authorize some one else to do these things for him.

12. When he does not exceed his authority he binds the other part-owners, but a third person may deal with him on his personal credit. And if they, believing he has thus dealt with a third person, settle their accounts with him, they are not liable to the creditor. He cannot establish a claim against them. If a ship's husband is not a part-owner, every part-owner is liable to him for the whole amount.

13. A ship is sometimes pledged as security for

money borrowed. This contract in law is called bottomry. The essential features of it are: first, that the ship is bound for the payment of money; secondly, that it is to be repaid only in the event that the ship performs a certain voyage and arrives at the end of it in safety. Therefore, if a ship is lost before the end of the voyage, or the expiration of the period specified, no part of the money is due, in other language, the whole debt is paid by the loss. As the lender thus consents that the repayment of the money shall depend on the safety of the ship, he has a right to charge an additional amount to the legal interest in order to cover his risk. This is called marine interest. If the interest is not mentioned in the contract, it will generally be regarded as included in the principal. If the lender takes more than legal interest, and the money is to be paid to him notwithstanding the loss of the ship, the contract is not one of bottomry, and is illegal. But the lender may take marine interest and security for his debt in addition to the ship itself, in order to make the payment more sure on the arrival of the ship, whenever no payment is to be made to the lender should she be lost.

14. The most common contracts of bottomry are those made by a master in a foreign port when money is needed and cannot otherwise be obtained. Sometimes, however, they are nothing more than contrivances to get a large rate of in-

terest. If the money is payable at the end of the voyage and the owner or master terminates the voyage sooner, either honestly or from a change of plans, or dishonestly by wrecking, or in some other way destroying the ship, the money is at once due.

15. An owner may employ the ship in carrying his own goods, or those of another. He may carry the goods of others though retaining the direction of the ship, or he may lease her to carry the goods of other persons. In the first case the goods are carried as freight; in the second place the ship is let by an instrument called a charter-party.

16. He may partly load his ship with his own goods and then take the goods of others to fill the vacant space; or he may regard it as a general ship, to go from one specified port to another to carry the goods of all who offer them. It may be remarked that the word freight is used in different senses. Sometimes it means the goods or cargo carried; sometimes the money paid by the shipper of goods to the owner for carrying them. When the word is used in this latter sense the word money is often added, "freight-money," which leaves no question concerning what is meant.

17. The person who sends the goods may, or may not be the owner of them, and he may send them either to one who is the owner, or to his agent. The sender is called the consignor of the

goods and the other party to whom they are sent the consignee. The sending of them is called the consigning, or the consignment of them.

18. The rights and duties of the ship owner and the shipper are stated in an instrument called a bill of lading. This is a very ancient document, and is used by all commercial nations. It contains the names of the consignor, of the consignee, of the vessel, of the master, of the place of departure and of destination; also the price of the freight and other charges, and a sufficient description of the goods to indicate what they are. It is signed by the master of the ship. He ought not to sign it until the goods are actually on board, but very often this is done before. Usually, a copy is retained by the master and three copies are given to the shipper, one of which he retains, another is sent to the consignee with the goods, while the third is sent to him in a different way.

19. The delivery is to the consignee or his assigns, in other words, to him or to such a person as he may direct. This direction may be made by indorsing the bill and ordering the delivery of the goods to another; or the consignee may indorse the bill in blank, and whenever this is done any person who acquires an honest title to it may write over the signature an order of delivery to himself. It is said that the consignee has such a power to assign the bill even if the word assigns

is omitted. As the indorsement transfers the property in the goods, the indorsee has a right to demand them. If, however, the goods are not delivered, an action on the bill must be brought in the name of the original consignee.

20. As the bill of lading is evidence against the ship owner that they have been received, and also of their quantity and quality, it is common to say "contents unknown," or "said to contain." Even without such words the bill of lading is not absolutely binding on the ship owner, and he may, therefore, show that its statements were erroneous, either intentionally or by mistake.

21. The ship owner has a lien on the goods for the freight-money. The master cannot demand this without delivering the goods or offering to do so at the proper time, and in the proper way, and to the right person. When this is done the consignee is not entitled to the goods without paying the freight-money that is due on them. This lien is established by law whether it is mentioned in the bill of lading or not.

22. By the common law, an agreement to deliver goods before paying the freight-money for carrying them destroys the lien. But unless the ship owner intended to give up his security on the goods, it is said that a court would be inclined to preserve the master's security on his goods for a reasonable time, unless they should actually become the property of another by purchasing them.

23. The contract for carrying goods is for carrying the whole of them to the place of destination. If, therefore, a ship was wrecked and the voyage was not completed, there would be no right to recover compensation. But if a wreck or other accident happens, the master has the right to put them in another vessel and send them forward to their destination, and when they arrive there he may claim the whole freight-money which the shipper agreed to pay. But he can claim no more than the original amount. He not only may, but must send forward the goods at his own cost if he can do this by any reasonable means. He is not responsible, however, for any delay thus occurring. The shipper, by his agent, may always recover his goods at any intermediate place by tendering all the freight-money, because the master's right of sending them forward is merely to earn this. On the other hand, as the master cannot be deprived of his right to send them forward unless the shipper pays all the freight-money, he must do this whenever he desires to obtain possession of his goods, however greatly they may be injured. But there are cases in which freight-money is payable for a part of the distance, or to a certain degree, and the question is a somewhat difficult one, by what rule or proportion shall the freight-money be measured? One rule is purely geographical and was formerly much used. That is, the whole freight-money is

payable for so many miles, and for a shorter distance in proportion. Another is of a purely commercial character. As the freight-money is a fixed sum for the whole distance, what will it cost to bring goods to the place where they were received, and how much to take them to their original destination? Neither of these rules has been generally adopted in this country.

24. If the bill of lading requires delivery to the consignee or his assigns, "he or them paying freight," which is usual, and the master delivers the goods without receiving the freight-money, he cannot fall back on the consignor and make him liable without showing that he actually owned the goods. Generally, the one who receives them is liable for the freight-money, but he is not if he is merely an indorsee or assignee of the consignee and obtains them by his order. If the master delivers goods to any one, saying that he will look to him for the freight-money, he may demand this of him, unless that person had the absolute right to them without paying it. This is rarely the case.

25. If freight-money is paid in advance and is not afterward earned, it must be repaid, unless the master can show that the owner took a less sum than he would otherwise have done, and for this or some other reason the money paid was in final settlement and was to be retained by the owner at all events.

26. Again, should a consignee pay too much he may recover the excess back, if it was paid through ignorance or a mistake; but he cannot do this if the payment was made with the full knowledge of all the facts, and his ignorance or mistake was simply concerning the law.

27. If one sells his ship after a voyage is begun he can claim the freight-money of the shipper although the contract of sale may require him to pay it over to the purchaser. A mortgagee of a ship who has not taken possession, that is, a person who has lent money on the security of it, has in general no right to the freight-money, unless by a special agreement.

28. No freight-money, of course, can be earned by an illegal voyage, as the law will not sanction or enforce an illegal contract. Goods are to be delivered by the bill of lading, in good condition, excepting the danger of seas and such other risks as may be mentioned. If the goods are injured by any of these perils and yet are actually delivered the freight-money is payable.

29. A shipper or consignee cannot abandon goods for the purpose of escaping the payment of the freight-money due on them, though they may be worthless, whenever this has been caused by a risk for which the owner of the ship was not to be responsible. But if they are actually lost, though not in form, for example, if sugar is washed out of boxes or hogsheads, or wine leaks out of casks

in consequence of injuries arising from the perils of the sea, a delivery of the boxes or casks without their contents is not a delivery of the sugar or wine, and consequently no freight-money is due. If the goods are injured, or if they actually perish and disappear by internal defect or change, the freight-money must be paid. If, on the other hand, they are lost in consequence of the fault of the owner, the master or crew, the loss must be made good. In such a case, however, the ship owner may have a deduction for his freight-money. If goods are delivered, although injured and diminished in value from faults for which the owner is responsible, for example, bad storage, negligent navigation and the like, the freight-money is due after deducting the amount of the injury thus arising.

30. The rules relating to passage money are quite the same as those relating to the payment of freight-money. Usually, however, this is paid in advance. But it is not earned except by carrying the passenger, or a part of it by carrying him a portion of the way with his consent. If it is paid in advance and not earned through the fault of the shipper or owner, it can be recovered back.

31. The owner may let his ship to others, and this is done by an instrument called a charter-party. This agreement is of a variable nature, depending on the circumstances and pleasure of the parties. Generally only the right to carry

goods is let; in legal phrase, the burden of the ship. The owner holds possession of her, pays her master and crew and furnishes supplies, and makes repairs and navigates her. Sometimes, however, the owner lets his ship as he might let a house, and then the hirer takes possession, mans, navigates, supplies and even repairs her. When a ship is thus let, bills of lading are not given by the ship owner to the hirer; but he takes the goods of other shippers and bills of lading are given by him to them. When the ship owner retains possession, which is far more common, bills of lading are usually given, as in the case of a general ship.

32. The charter-party designates the ship and master and parties, also her tonnage, or capacity; also what parts of the ship are let and what parts, if any, are reserved to the owner or to the master. It also describes the voyage or period of time for which the ship is hired, the days for remaining in port, the length of time for discharging the cargo, the obligation to man, navigate, supply and repair the ship, and all other particulars of the bargain. Finally, it states how much is to be paid for the ship, whether by the ton or otherwise, or a gross sum for the whole burden, and when the money is payable and how, in what currency or in what exchange, especially if it is to be paid abroad. Nor can the terms of the instrument be varied or changed by external evidence.

33. If the hirer takes the whole vessel he may put the goods of other shippers on board, but whether he fills the whole ship or not, he pays for the whole. Payment for the empty portion is said to be for dead freight. If either party is deceived or defrauded by any statement in the charter-party, he can recover for the injury.

34. The voyage may be a double one; it may be a voyage out and one in return, or a voyage to one port and then to another. The question sometimes arises whether any freight-money is payable if the ship arrives in safety and delivers her cargo there and is lost on her return with the cargo she is then carrying. Of course, the parties may make what bargain they please, but when none is made, the tendency of the courts is to consider each voyage at the end of which goods are delivered as a voyage by itself and earning its own freight-money.

35. As time has become of the utmost importance in commercial transactions, both parties to the contract should be punctual, and cause no unnecessary delay; and when there is, the party injured has a remedy against the other. The charter party usually provides for so many lay-days, or working days, for loading or unloading the vessel. These are counted from her arrival at a wharf or other place of discharge, and not from her arrival at the port of destination. Sundays are computed in calculating lay-days at the

port of discharge, but if the contract specifies working lay-days, Sundays and holidays are excluded. If more than the agreed lay-days are occupied, payment must be made for them, and demurrage means the sum which is thus paid. Usually the charterer agrees to pay a fixed sum as demurrage for each day. If after the lay-days allowed for unloading have begun, but before the cargo is unloaded, the ship and cargo, or cargo alone, without the fault of the owner or master, is lost, the freight-money is due, because that was earned as soon as the vessel arrived. If time is occupied in repairing the ship without the fault of the owner or master, the charterer pays during this time, unless the repairs are in consequence of her original unseaworthy character.

36. Many cases have arisen in which the ship was delayed from different causes giving rise to the question, which party ought to pay for the time thus lost? An eminent writer has said that no delay arising from the elements, as from ice or tides or tempests, or from any act of government, or from any disability of the consignee which could not be imputed to his own act, or to his own wrongful neglect, can give rise to a claim for demurrage. It is essentially due only for the fault or voluntary act of the charterer; but if a vessel is hired by the day, week or month, and is delayed by seizure, capture or other cause, and the impediment is removed and the ship com-

pletes her voyage, the charterer pays for the whole time. If she is condemned or otherwise lost, this ends the voyage and the contract.

37. The contract may be dissolved by the parties, or against their consent by any circumstance making its fulfillment illegal, for example, by a declaration of war on the part of the country to which the ship belongs against the country to which she was bound. So either an act forbidding commercial intercourse, or a blockade of the port to which the ship was going would have the effect of annulling or suspending the contract.

38. Next may be considered the navigation of the ship. The master has the whole care and supreme command of his vessel. He must see to everything relating to her condition, including repairs, supplies, loading and unloading, and navigating her. He is principally the agent of the owner; to some extent however he is the agent of the shipper, of the insurer, and also of all who are interested in the property under his charge.

39. Much of his authority as agent of the owner springs from necessity. He may even sell the ship in a case of extreme necessity, or pledge her for a debt. He may also charter her for a voyage or a period of time, he may raise money for repairs and incur a debt for making them. Necessity, however, is the reason for thus acting. Consequently, if the owner is present, or his agent, or is within easy reach, the master has no power to

do these things. If they are done in the home port, the owner is liable only when he ratifies or adopts the conduct of the master. If the ship is in a foreign port, even if the owner was there, he may be liable on his master's contracts of this kind to those who neither knew, nor had the means of knowing of the owner's presence. He can sell a ship only in a case of extreme necessity, in other words, only when it seems impossible to save her, and a sale is the only mode of preserving any part of her value for the owners or insurers. So, too, he can pledge her, but the necessity must be very great, though less than is required to authorize a sale. If money is really needed for the safety of the ship and cannot be otherwise raised, or not without great waste, a pledge can be made. Again, he cannot charter the ship unless a necessity exists. Of course, he can do this if he is clothed with the power; but when he does not possess it, the necessity for doing so is simply a mercantile one and no other. Again, to bind the owners for repairs or supplies, there must be a necessity for them, but he is justified in incurring the expense if the condition of the vessel requires them for the safe and comfortable prosecution of the voyage.

40. Unlike other agents, a master, whenever he is unable to discharge all his duties, may substitute another for himself who possesses all his authority.

41. Generally, a master has nothing to do with the cargo beyond receiving and delivering it. But if necessity arises, he may sell it, or a portion of it, at an intermediate port, whenever he cannot carry it further, or it must perish before he can receive specific orders. Again, he may sell it, or a portion, or pledge it to raise money for the common benefit of the owners of the ship and cargo.

42. An owner is liable for the wrong-doings of the master while he is acting in that capacity. But he is not liable for his wrongful acts when he is not thus acting, although holding the office at the time. Thus, if through want of skill or care, he should run down another vessel, the owner would be liable for the collision; but he would not be liable if the master should quarrel with a man and beat him on shore, or even on the deck of his vessel; nor would the owner be liable if the master should wrongfully take goods on board his ship to derive a profit from them.

43. The general rule of liability in this country for collisions is, if both parties are equally in fault the loss is apportioned between them. If neither party is at fault, the loss rests where it falls. But if the fault is wholly on one side, the other can recover full compensation.

44. A few principles may be added concerning seamen. The law makes no distinction between officers and mates, as they are usually called, and common sailors. Every master of a vessel is

bound to have shipping articles which every seaman on board must sign, describing the voyage and the terms on which he is to serve. Courts protect seamen against unusual stipulations. If a number of ports are mentioned, they are not to be revisited, unless the articles give the master discretion.

45. Seamen have a lien on the ship and on the freight for their wages. By an ancient rule freight is said to be the mother of wages, and consequently any accident or misfortune whereby a ship cannot earn its freight-money destroys the claim of the sailors for wages.

46. Provisions of due quality and quantity must be furnished by the owner, and double wages are given to seamen when they are on short allowance, unless the necessity is occasioned by some peril of the sea or other accident of the voyage. The master at any time may put them on a fair and proper allowance to prevent a waste of food.

47. Should they doubt the seaworthiness of the vessel, it may be examined at home or abroad on the complaint of the mate and majority of the seamen. After they have shipped, if they refuse to embark on the voyage because the vessel is not in a fit condition, they may be arrested and a court will inquire into her condition, and if the complaint of the seamen is justified in some degree, will discharge them.

48. The law also requires that every ship shall have a proper medicine chest ; and a monthly deduction is made from the wages of seamen to create a fund for maintaining marine hospitals to which they may go without charge.

49. The right of a seaman to be brought back to his home is guarded by law. The master should also present his shipping articles to the consul or commercial agent of the United States at every foreign port visited by him. This is a positive requirement on his arrival at the home port; and on arriving home from a foreign voyage if any seaman is missing the master must account for his absence. If he discharged a seaman abroad with his consent, he must pay to the American consul three months' wages. Two-thirds of this sum is given by the consul to the seaman, and the other third is remitted to the United States Treasury to form a fund for bringing home seamen. Of course, this obligation does not apply when the voyage is ended by a wreck or similar misfortune.

50. Persons are employed to repair ships and furnish them with supplies. They are called material-men. Such persons and all who work about a vessel, like stevedores, who load and unload it, have a lien thereon for their charges. Though by common law material-men have a lien only on foreign ships, in many states by statute they have a lien on all ships, whether domes-

tic or foreign.* The lien extends beyond mere repairs to alterations and to rebuilding, but not to the general construction of a vessel. The laborer employed in general work by a shipwright or mechanic has no lien on the vessel for his labor. The liens thus established by statute, take precedence of the claims of all other creditors.

*In the case of *The General Smith*, 4 Wheaton 443, Mr. Justice Story remarked: "Where repairs have been made, or necessities have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law gives the party a lien on the ship itself for his security. But in respect to repairs and necessities in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied, unless it is recognized by that law." In a recent case, *Stephenson v. The Francis*, 21 Fed. Rep. 719, Judge Brown has remarked: "When a known owner, not being master, procures necessary repairs or supplies in a foreign port, the question whether a maritime lien arises therefor must depend on the intention of the parties, to be gathered from all the circumstances of the transaction. There is no presumption of law that an owner, because he is in a foreign port, including in that designation the different states of this country, is without means, reputation or credit, and has no other resource but the ship to obtain needed supplies. Maritime liens for repairs and supplies, being secret incumbrances, are not favored. They are allowed only upon grounds of commercial convenience and necessity."

CHAPTER XVI.

MARINE INSURANCE.

1. Marine insurance is now effected by companies.
2. Nature of the contract.
3. Form of the policy.
4. It is signed only by the insurer.
5. A party may be insured who is not named.
6. Alterations.
7. A policy may be transferred.
8. But the insurer must consent.
9. The insured must be interested in the property.
10. What is a valued, and what is an open policy?
11. The valuation is binding on both parties.
12. What may be valued?
13. Valuation of freight.
14. Valuation in an open policy.
15. The description of the property insured.
16. The description must identify it.
17. Freight may be covered by over-valuing the ship.
18. Freight may be insured though purchased with proceeds of an illegal voyage.
19. So can freight-money.
20. The insurer is only liable for property not covered by prior insurance.
21. Double insurance.
22. What is a warranty?
23. Subjects of warranty.
24. The sailing of the ship.
25. Implied warranties ; seaworthiness.

26. What is meant by seaworthiness?
27. Other implied warranties.
28. Misrepresentations and concealments.
29. What facts should be stated.
30. Those need not be that are already known.
31. Statements leading to inquiry.
32. False statements.
33. Statements should be fairly construed.
34. When the premium is due.
35. The premium is not due unless the risk is incurred.
36. Perils covered by the policy.
37. What is meant by perils.
38. Extraordinary perils.
39. Enumeration of perils.
40. Same subject.
41. An insurer is not liable for a loss of worn-out rigging.
42. An insurer does not insure against the acts of the insured.
43. A damage to the cargo through the ship's fault does not discharge the insurer.
44. Generally a loss will not be attributed to the master.
45. A total loss.
46. A general average in the case of a partial loss.
47. The essentials of a general average.
48. There must be a common peril.
49. How a general average usually arises.

1. At the present day insurance is rarely made by individuals. Formerly, this was the universal custom in commercial cities. Afterwards, companies were formed for the purpose of insuring ships and their cargoes, and in a short time they superseded individuals in conducting the business.

2. The contract of insurance binds the insurer

to indemnify, or make good, the insured against loss or injury to the ship, or his interests therein, from specified perils. The consideration for the contract on the part of the insurer is the premium paid by the insured. The contract of insurance is called a policy. No instrument is needful to make such a contract valid; if the proposals of the insured are written in a proposal-book and are signed by a proper official with the word "done," or "accepted," or in any way indicate a bargain, they are valid even without a policy. Indeed, it has been asserted that an oral contract of insurance would be legal.

3. The form of policy in general use is familiar both to the insurer and insured, for it has been in existence many years, both in England and in this country. Of course, some changes and modifications have been made from time to time, but its general features have long been known.

4. It is signed only by the insurer, though it binds both parties. It may be made on the application of an agent of the insured whenever he has proper authority for this purpose. This need not be in writing, but a mere general authority would not be sufficient.

5. A party may be insured who is not named by using the words, "for whom it may concern," or others of a similar character. A person who seeks to have the benefit of such a policy must show that he had an interest in the ship at the

time she was insured. Another phase is, "on account of owners at the time of loss." This will cover all the losses of all persons for whom the policy was intended, who then owned the ship, although there may have been transfers between the time of insuring and her injury or destruction.

6. Alterations may be made at any time by consent, but a material alteration by the insured without the consent of the insurer discharges him, although it was made honestly, believing or expecting that the insurer would readily consent. A material mistake of fact made in a policy can be corrected by making a proper application to a court.

7. A policy may be transferred or assigned, and the assignee may sue, if occasion shall require, in the name of the assignor. If the insurer assent to the transfer, this does not always make a contract between him and the assignee on which he can sue in his own name. When the loss is made payable to order or to bearer, it is then negotiable by indorsement or delivery, but the transferee cannot even then sue in his own name. When the insured transfers the ship without transferring the policy, with the consent of the insurer, the policy is discharged or ended, unless it was expressly made for the benefit of whoever should be the owner at the time of the loss.

8. There is usually a clause to the effect that the policy is void if assigned without the consent

of the insurer, but this does not apply to a transfer that is accomplished by law, for example, by insolvency or death. And after a loss has happened the claim against the insurer may be assigned.

9. The contract of insurance is one of indemnity for loss. The insured must therefore be interested in the ship at the time the loss happened. A mere possibility or expectation cannot be insured, but an actual interest in a vessel may be. If one has bought goods he may insure them, and can recover for their value when they are lost. Or if one has taken a risk, or agreed to indemnify another, he may insure himself against the risk. And if one repairs a house or ship and has a lien thereon, this is an insurable interest. Generally, every one in possession of goods who has a lien on them, may insure them; and a lender of money that is secured by a pledge may insure the ship or goods pledged. And any person who has possession of a ship, house or merchandise, or a right to the possession of it, like a factor, consignee or carrier, may insure his interest. But a mere indebtedness to a creditor for money borrowed that may have been used in buying a ship, does not give him the right to insure her.

10. The value or sum to be paid may be fixed by agreement in the beginning and mentioned in the policy. It is then called a valued policy. Or, the agreement may be that the amount shall

be ascertained by proper evidence, and the policy is then called an open policy.

11. This valuation, if made in good faith, is binding on both parties, even though it be very high. But a wager policy, in other words, one not founded on value, is void. Even if there be some value, it may be so excessive as to create the belief that it was a mere cover and that the contract was only one of wager.

12. One thing insured may be valued and not another; or the same thing may be valued in one policy and not in another. If only a part of the goods included in the valuation are on board, it applies to them proportionately. A valuation of an outward cargo will generally be taken as a valuation of a return cargo that is substituted for the other by purchase, and is covered by the same policy. And the valuation will cover the whole interest of the insured in the thing valued, unless a different purpose is indicated.

13. A valuation of freight applies to the whole cargo; and if a part only is risked, it applies in proportion. If profits are insured, they are generally valued. And very often profits are insured by valuing goods high enough to include all the profits that can be made on them.

14. In an open policy, in which the value insured is to be determined by evidence, the value of the ship or goods insured, is their value at the time of insuring them, including the premium of

insurance. If a ship is insured, her value throughout the period of insurance is the same as at the beginning, and no allowance is made for the effect of time. While her value does not thus vary, the interest of the insured when the loss occurs, whether it be one-half, one-quarter or other part, is that on which he founds his claim. Generally the value of goods is the price paid for them, or invoice price, with all the charges, commissions, wages, etc., that enter into their cost to the owner.

15. In a policy there is usually added to the description of the ship, "lost or not lost." By this phrase the policy operates in the past, and is effective even though the ship be not in existence at the time of insuring her.

16. The description must identify the thing insured by quantity, marks, numbers, size, or in some other satisfactory manner. And no mere mistake in the name will affect the description if what was actually insured is known. The phrase, "a return cargo," will generally apply to a homeward cargo of the party insured in the same ship, but the phrase "proceeds" or "returns" is generally regarded as limited to a return cargo, bought by means of the outward one.

17. It is common to cover the freight by an over-valuation of the ship, but an open policy on the ship does not cover the freight. An owner of both ship and cargo may cover by the word

freight what his ship would earn by carrying a cargo for another. Insurance on freight from one port to another covers the freight on goods taken by agreement at intermediate ports.

18. A cargo which is lawful may be insured, and this may be done even though it was purchased with the proceeds of an illegal voyage.

19. Freight-money, or money that is to be paid for carrying goods, is often insured. In insurance the term includes the money to be paid to the owner of a ship by the shipper of goods, and the earnings of an owner by carrying his own goods, for their value is increased by carrying them from one place to another; also the amount to be paid to him by the hirer of his ship, and the profits of the hirer either by carrying his own goods, or by carrying for pay the goods of others. An interest in freight-money begins as soon as the voyage is begun and the ship is actually ready for sea, and goods are put on board, or are ready to be thus placed, or are promised to be put on board by a contract that is binding on their owner.

20. Marine policies generally provide that the insurer shall be liable only for so much of the ship or other thing insured which is not covered by prior insurance. The second policy covers what the first leaves, the third what is left by the second, and so on. Whenever the whole value of the ship is covered by three policies, for example, later ones are of no account. In no event can

more than the loss or indemnity be recovered. Sometimes the policy provides that the insured shall recover only the same proportion of the whole loss which the amount insured in that policy bears to the whole amount insured by all the policies. If all of them take effect at the same time, and afterwards the property diminishes in value, then all of them are diminished.

21. If a second policy is obtained, and no mention is made of the first, the liability of the insurer is determined by the proportion insured. Nor is any double insurance taken, unless all of the policies insure the same thing, and, taken together, exceed its whole value. Many insurances of the same thing for different persons, who are interested therein, do not create double insurance.

22. A stipulation or agreement in a policy that a certain thing shall be, or shall not be, is a warranty; and there must be an exact compliance with it. The excuse is not good that the thing is not material, or that the violation was not intended, or not known, or that it was caused by an agent of the insured. A warranty is legal even if it is written on a separate paper to which the policy refers. If there was a violation of the warranty at the beginning of the risk, the whole policy is avoided, notwithstanding a compliance with the warranty afterward and before a loss, and although all other risks were distinct from that to which the warranty related.

23. The usual subjects of warranty are, first, the ownership of the property, which is chiefly important because it secures neutrality or freedom from war-risks of the property insured. The neutrality of the ship is sometimes expressly warranted, which is not broken if a part of the cargo that is not insured belongs to an enemy. The neutrality of the ship or the cargo must be proved by having on board all the usual and regular documents.

24. The other most common express warranty is that of the time of the sailing of the ship. She sails when she weighs anchor or casts off her fastenings and gets under way, even though she stops afterwards and is driven back. But even though ready and intending to go, if she is stopped before getting under way, this is not a sailing.

25. Besides express warranties, others are implied. One of these is seaworthiness. By this is meant that the ship in every respect is able to begin and prosecute the voyage proposed, and encounter safely the common dangers of the sea. When the ship is seaworthy and the policy becomes binding, no violation of it afterward by the insured discharges the insurer from liability for a loss that happened before it was violated. Even though the policy is not binding at the beginning of the voyage, when the unseaworthiness is quickly and entirely remedied, the policy binds

both parties. When she becomes unseaworthy from a peril that would not thus have affected her had she been originally seaworthy, the policy is void; otherwise it continues valid until she can be restored to a seaworthy condition. The master must repair her as soon as he can, by the aid of another ship if he can do so; when this cannot be done, he should not keep her at sea if he can readily make a port where she can be made seaworthy. Having entered such a port, his ship should not leave it so long as she is in an unseaworthy condition if she can be made seaworthy there. If she does leave sooner, the insurer is no longer liable; the liability however may not be destroyed, but only suspended, if she is made seaworthy at the next port.

26. There cannot possibly be a definite and universal standard for seaworthiness. The ship must be fit for her voyage, or for her place; and a coasting schooner must have one kind of fitness, a freighting ship to Europe another. The same remark applies to the crew, or pilot, or furniture, and also the rigging or sails. In all these respects much depends on usage. Parsons says there is no better test than this: "A ship must have all of these things in such quantity and of such quality as the law requires, provided there is any positive rule of law affecting them; and otherwise such as would be deemed requisite according to the common consent and usage of persons engaged in that trade."

27.. There are other implied warranties besides seaworthiness. One of them is that the insured shall deal honestly with the insurer, and make a distinct and true statement of all the circumstances affecting the risk. Another is that the ship shall pursue the usual course of her voyage and without deviation.

28. There must be no misrepresentation concerning the character of the ship. Nothing should be concealed, for misrepresentation or a concealment discharges the insurer. Many questions have arisen concerning the nature of the representations made. It is said that any statement in reply to a distinct inquiry will be deemed material. On the other hand, the insured is not bound to communicate any mere expectation, or hope, or fear, but only the facts material to the risk.

29. Much has been said concerning what things should be made known. Not only should facts be stated by the insured, but also intelligence and rumors, if such matters are important to the risk, and it has been asserted that intelligence known by the clerks of the insured is presumed to have been known by him. If the voyage proposed should violate a foreign law not generally known, this should be stated. Indeed, everything should be stated that might reasonably be considered in estimating the risk. Obviously the season, or political events, or the character of the voyage,

may make a thing material in a particular case that would not be in other cases.

30. The insured need not state to the insurer things that he already knows, or ought and may be supposed to know. They include such as are as open to the insured as they are to the insurer. For example, general facts that are widely published and are generally known by all who are interested in such matters. Likewise, things resting on a general rumor that were known to all alike, and also facts of science, the position of a port, the peculiar dangers or liabilities of any well known navigation; the course of winds, currents or weather.

31. If either party should say something to the other that ought to put him on inquiry and none is made, his ignorance is his own fault and he must bear the consequences.

32. A false statement that other insurers have taken the risk on certain terms will vitiate a policy. And so will a statement that a ship is new when she is old, for her age is an important fact in determining the premium that must be paid. Again, if different policies are on the same vessel and relate to each other, a false statement or misrepresentation to the first insurer is regarded as passing onward and affecting every other.

33. Every statement or representation should be construed fairly so as to include all just and reasonable inferences. A substantial compliance with it will suffice.

34. The premium is due when the contract of insurance is completed, but in this country the premium is usually paid by a note that is given on the delivery of the policy, or soon afterward. If the receipt of the premium is acknowledged in the policy, this will not prevent an action to get it whenever it has not been paid.

35. Even though the premium is paid it is not earned unless the risk is incurred, and which is not whenever the ship does not sail, or have the goods that are insured on board. Furthermore, if the premium is not earned in part or in whole, it must be returned, either in whole or in part, by the insurer whenever it has been paid. The premium may be partly earned, and then only a part of it need be returned. For example, if the voyage consists of several passages and these are not connected by the policy as one entire risk ; or if the insured has some goods on board, but not all, that he intended to insure. But if the whole risk is assumed, even for a short time, during which the insurer, in the event of loss from a sea peril, might be required to pay the whole amount, no return of the premium can be demanded.

36. Next may be considered the perils covered by the policy. An insurer is liable only for extraordinary risks. The very meaning of seaworthiness is that the ship is able to encounter all ordinary perils. If she is lost or injured by an ordinary peril, common weather, for example, the

insurer is not liable, because the ship should be able to withstand this. And if the loss is unexplained, and was caused by no extraordinary peril, this fact would raise a strong presumption of unseaworthiness. Nor is an insurer liable for loss or injury by wear and tear, or natural decay, or the effect of age. Every part of the ship must, of course, decay, and when she is known to be lost the insurer is not liable without sufficient evidence of an adequate cause. Without this evidence the presumption would be that she was lost by reason of her defectiveness, caused by age and natural wear and tear.

37. By perils are meant those incident to navigation, especially those arising from the wind and weather, the rocks, coast and the like. But it must be remembered that an insurer does not include everything, only so many of these as are extraordinary. Consequently destruction by worms is not such a peril as renders an insurer liable, because it is not extraordinary. They exist in all waters, and at certain seasons the dangers from this cause are very great. If the vessel or cargo be injured by rats, the insurer is not liable, for the danger is regarded as similar to that from worms.

38. If a vessel reach a harbor in the course of her voyage and is detained by stress of weather, or by ice, or by any such cause, the expense of the delay must be borne by the owner and not by the insurer, but the expenses incurred by going to

some place for repairs must fall on the insurer. If nothing is heard from a vessel for a reasonable interval, the legal supposition is that she has perished. The law presumes that she was lost by an extraordinary peril of the sea and the insurer must pay for her.

39. Some of the perils may be briefly mentioned. One of them is collision. We have already considered the rules of law describing the duties of ships when meeting each other with respect to the course they must pursue. Fire is another peril, and the insurers are not liable unless it is caused by something extraordinary and not belonging to the inherent qualities of the thing that takes fire. The master and crew may burn a ship and cargo to prevent their capture by an enemy, for this is their duty to the state; and the insurers would be liable for their destruction even though the policy should expressly exempt them from liability for loss by capture, or by war risks. The insurers would also be liable for any direct and immediate consequences of the fire, and for losses caused by the endeavor to extinguish it. Perhaps the most general rule is that insurers are liable for the loss or injury that is the natural, direct and proximate effect of any insured peril, although the loss might be the immediate effect of a preceding loss. For example, should a part of the cargo be burned and another part be injured by water used to stop the fire,

40. There are other perils like piracy, robbery and theft that need not be described. There is another peril called barratry, which means the wrongful act of the master, officer or crew against the owner. As the master is appointed by the owner and is controlled by him, many policies provide that they will not insure against barratry, if the insured is the owner of the ship. The purpose of this is obvious. It is to prevent an insurance of the owner against the acts of one who should, or ought to hold himself responsible. As a general rule, insurers are liable for the misconduct of the crew when all reasonable precautions have been taken by the owner and the master to prevent such misconduct.

41. Insurers are not liable for a loss to the rigging and other parts when they are worn out by age or hard service. This rule applies most frequently to perishable goods. They are not liable for the loss of any article whenever it was caused by inherent qualities, unless these became destructive by an insured peril. Thus, hemp rots from fermentation, but which cannot occur when it is kept dry, consequently insurers are not liable for a loss of this character arising from dampness when it was taken on board ; but if the vessel were strained by tempest and her seams were opened, and in this way the hemp became wet and then rotted, the insurers would be liable.

42. Insurers do not insure any man against his

own acts. But for the negligence or wilful misconduct of the master or crew the insurers may be liable, because in this respect they are not the agents of the owner. They would indeed be his agents if he directed the wrongful act or negligence that destroyed the property, and in such a case the insurers would be discharged, but we can hardly imagine such a state of things. An owner does not give directions to his servant to be negligent, or to do wrong. Consequently, the law assumes that an agent in doing a wrongful thing, or in neglecting to do his duty, is acting solely on his own account, and not in a representative character.

43. If the cargo is damaged through the fault of the master or crew, the shipper has a remedy against the owner of the ship, but this does not discharge the insurers. If, however, he enforces his claim against them, he is bound to transfer to them his claim against the ship owner. For the insurers of the cargo, by paying a loss thereon, put themselves in the position of the shipper and acquire his rights.

44. Generally no loss will be attributed to the negligence or fault of a master or crew that can be attributed to any of the perils mentioned in the policy.

45. A loss may be total. This happens when the whole property passes away ; for example, by sinking or destruction by fire. The law also re-

gards a loss as total when the ship or goods are partly destroyed, and permits the insured to abandon whatever is saved to the insurers and claim from them the total amount specified in the policy. The abandonment transfers all that remains of the property to the insurers. If nothing remains, or it possesses no value, there need be no abandonment and yet the loss is total.

46. If the goods of several owners are in peril, and those of one of them are wholly or partly sacrificed for the purpose of saving the remainder, all must contribute towards indemnifying the loser. He is not to be fully indemnified, for then he would be better off than the others, and justice is perfectly satisfied if in the end he suffers like them. This end is attained by a general average. The loss is ascertained and such an assessment is made on the property saved for the benefit of the owners of the property lost as will equalize the loss among all. In this way every one interested loses an equal proportion of whatever was sacrificed for the common good.

47. The essentials of a general average loss are: first, a common peril impending at the time; second, a voluntary loss or sacrifice of some property for the purpose of saving other property; third, the success of the endeavor.

48. There must be a common peril, for if there be none the loss is merely wasteful. The loss also must be voluntary. There can be no volun-

tary sacrifice creating a claim for contribution whenever the property destroyed was not merely in danger, but was certain of destruction, because there is no voluntary sacrifice in casting away property that must be inevitably lost. But when the loss of the whole is inevitable, and a part can be saved by destroying the remainder, this is a general average loss for which a contribution should be made.

49. The most common way in which general average arises is by jettison, or the casting overboard of some part of the cargo to save the remainder. If the goods jettisoned are recovered, the loss is then only the expense of recovery and restoration, which must be averaged and paid in such a manner as to fall on all in equal relative proportions.

CHAPTER XVII.

FIRE INSURANCE.

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1. Fire is one of the perils insured against by marine policies. It is usual, though, to insure buildings and their contents against fire alone. The general purposes and principles of this kind of insurance are the same as those already mentioned; and the law differs only in those ways in which a difference is necessary by reason of the character of the property insured. This kind of insurance is to indemnify against loss by fire of ships in port, more often of warehouses and of property stored in them, and still more frequently of goods in stores or factories, or in dwelling-houses or in barns. The most common application of all is to dwelling-houses.

2. Like marine insurance, fire insurance in this country at the present time is effected almost wholly by companies. They are either companies in which persons own the stock and take all the profits as dividends; or mutual companies in which every one who is insured becomes a member, and the net profits, or a part of them, are divided among all the members in such a manner as the charter or by-laws of the company may direct. In some cases both forms are united in

a single company. In these companies there is a capital stock as a permanent guaranty fund above the premiums received; and a part of the net profits is paid as a dividend on this fund, while the residue is divided among the insured.

3. Of late years the number of mutual fire insurance companies has greatly increased in this country. The principal reason is because the premium paid is much less than that paid to stock companies. For example, if the insurance is for a period of seven years, which is a common one, the amount charged is perhaps the same, or even more, than that charged by stock companies. Only a small part, however, is paid in cash. For the rest a premium note or bond is given, promising to pay whatever part of the amount may be needed for losses that shall occur during the period for which the note is given. More than this the insured cannot be bound to pay; and it often happens that no assessment whatever is demanded, and sometimes when the company is well established and does a large business on sound principles, a part of the money paid is refunded when the insurance expires, or is credited on the renewal of the policy, if a renewal is made.

4. One of the differences between stock and mutual companies is, a stock company will insure very nearly the full value of the property insured, while mutual companies are generally restrained by their charters from insuring more

than half or two-thirds of the assessed value of the property. Consequently, one who is insured by a mutual company cannot be fully indemnified against loss by fire.

5. The methods of fire insurance companies are quite uniform throughout the country, and any company may appeal to the usage of other companies for answers to various questions. In the first place there may be an appeal to explain whatever needs explanation, but never to contradict whatever is clearly expressed in the contract. No usage can be admitted even to explain a contract unless it is so well established, or is so well known, that it may be supposed the parties contracted with reference to it. Thus, if under a policy against fire on a vessel in a port of this country an inquiry is raised concerning a local usage, the policy cannot be affected by a proof of usage on any particular matter in other ports of the world, or even of the United States. And not only must the terms of the contract be duly regarded, but also those of the charter. Thus, if it should provide that all policies and other instruments made and signed by the president, or other officers of the company, shall bind the company, an agreement to cancel a policy should be signed in the same manner.

6. In regard to the execution of a fire policy, there is no material difference between the law of fire and marine insurance. An adoption or rati-

fication of such a contract, either in a fire or marine policy, is the same thing as the making originally of the contract.

7. The rules of construction are generally the same in fire as in marine policies. A policy is sufficient if the words describe the persons, the location and the property sufficiently for the court and jury to determine their identity. In construing this, as well as other contracts, the intention of the parties is an important guide. The intention, however, must be that expressed in the contract. Otherwise, a contract that was not made would be substituted for the written one. Even to this rule there are many exceptions. For if by clear and positive evidence the truth is shown that a written contract does not express the actual and certain agreement of the parties, by reason of an accidental mistake or omission of words, it will be corrected by a proper tribunal.

8. There is one important difference between the contracts of mutual and stock companies. Every one who is insured in a mutual company becomes a member of it. Indeed, the principle on which this insurance rests is that all insure each other. Every insured person, therefore, is bound by all the laws and rules of the company as though they were of his own making. And this is equally true of marine and fire policies. The mutual fire insurance companies require that an application be made in writing after a peculiar

form prescribed by their rules. In each form of application various questions are put, suggested by experience, that are best calculated to elicit all the information needed by insurers for the purpose of estimating accurately the value of the risk they undertake. Specific answers must be given to all these questions, and to this application, with all these statements, questions and answers are referred in the policy and are made a part of the contract.

9. Sometimes there is no application in writing, but the policy itself states the facts relating to the risk. For this purpose it contains many blanks that are filled as each case requires. It may happen that what is written in these places is inconsistent with what is printed, and then the rule that whatever is written prevails, as that may be supposed to express the precise purpose of the parties better than the printed phrases that were prepared without special reference to that particular insurance.

10. It is usual in fire insurance to put in the policy a scale of premiums calculated on different classes of buildings, of stocks in trade, or other property in conformity with what is thought to be the greater or less risk of fire in each case. This is regarded as a matter of special importance, and if a statement were made by an applicant which put his building or property into a class of which the risk and premium were less than for the class

to which the building or property actually belonged, and in that way an insurance was effected at a less premium, the policy would be void, although the erroneous statement was made innocently.

11. If the printed conditions represent one class of buildings, or companies, or properties as more hazardous than another, the insured could not prove by other testimony that it was so in fact. Besides, the agreement requires that the property insured shall continue within the class where it is put, or at least that it shall not enter into another that is more hazardous during the continuance of the policy. A liberal construction, however, has been given to this rule. Thus, it does not apply when a single article, or one or two, are kept in a store as part of the stock of goods, although that article, cotton in bales, for example, is among those specified as hazardous. But if the building is generally appropriated to a more hazardous occupation than the proposals of the policy indicate, or if the introduction of these goods materially increase the actual risk, evidence would be received of the intention of the parties to the contract. Thus, when the storing of certain goods was prohibited in a given case as hazardous, it was held that the having a pipe or two of such articles in the cellar, from which similar vessels in the store were replenished, did not come within the meaning of the word "storing"

in the policy, any more than would the keeping of such articles for home consumption in a dwelling-house insured by a similar policy. So a description of a house, "at present occupied as a dwelling house, but to be hereafter occupied as a tavern and privileged as such," is only permission that it should be a tavern, and creates no obligation to keep and occupy it as a tavern on the part of the insured. But if the language is for its occupation in a particular way, and in no other, this restriction is a part of the bargain, and if it is not thus occupied the insurers are discharged. And if the premises are described as a private residence, the insurance is not rendered void by the fact that the occupants moved from the house, leaving it vacant, unless the risk was thereby materially increased.

12. The subject of alterations of property insured is a somewhat difficult one. Mere alterations, even though they are expensive and important, do not necessarily avoid the insurance, or discharge the insurers. But if they have the effect of increasing the risk, or if they are prohibited in the policy, then it becomes invalid.

13. Some other questions concerning alterations may be considered. Suppose, for example, one gets his dwelling house insured for seven years and describes it correctly as having a shingled roof, but after two or three years the shingles are taken off and slates are used. The risk is not in-

creased, nor is the work of putting on the new covering hazardous, and doubtless in such a case the policy would not be avoided. But suppose a metallic covering is put on that requires soldering; this surely is a hazardous operation, and if the building should take fire while making the change the insurance would be discharged. But if the operation was safely finished, then there would be no greater hazard from the use of such a roof than from the old one. Suppose again, that while the operation was going on the house was exposed to a greater risk from the outside, and was set on fire by an incendiary, would not the insurer in such a case be discharged?

14. If an alteration is of a permanent character and causes a material increase of the dangers of fire, then it is a violation of the contract and the insurers are discharged by making the alteration. Not only so, but as soon as the preparations for it are begun, for example, the erection of scaffolding to do the work, or any other preparation materially affecting the risk, they have the effect to discharge the insurers.

15. The insured has a right to keep his building in good repair, indeed, it is his duty as well as the interest of the insurer that he should do this, for any condition of disrepair would tend more or less strongly to increase the risk of fire. The insured, therefore, may repair without obtaining leave to do so, and the insurer is liable

although the fire takes place while the repairs are in progress, and even if it be caused by them. It may be added that the fire policies most frequently in use give the insured the right of keeping the property in repair.

16. With respect to the sufficiency of the interest of the insured to support an insurance, the same principle applies as in marine insurance. A legal interest is sufficient. One who has made only an oral bargain with another to purchase his house cannot insure it; but if he has made a written contract, the purchaser may insure. Again, if a debtor assign his property to pay his debts, nevertheless he has an insurable interest therein unless the property is sold. A mortgagor, also, may insure the whole value of his property, even after the possession has passed to the mortgagee, if his right to recover the same is not wholly gone. Again, both a mortgagor and a mortgagee may insure the same property and only one of them need specify his interest.

17. A trustee's agent or consignee may insure against fire, as he may against a marine loss. Generally a consignee is not bound to insure against fire, but may do so at his discretion. The agent of goods held on commission may insure expressly his own interest in them for advances, or he may insure only the owner's interest. When the interest is not expressed, the policy will be regarded as not covering the interest of the owners

if, on a fair construction of the words and facts, it seems to have been the intention of the party to secure only the consignee's interest. It is now a common thing for a commission merchant to cover in one policy in his own name all the goods of the various owners that have been consigned to him. "Goods held on commission" in fire policies have the same effect as the words, "for whom it may concern," in marine policies. A consignee of goods sent to him that are not received, may insure his own interest in them against marine risks, and he may also do the same against risks by fire. So, any bailee, or person in possession of goods, although for a short time, may insure them against fire. Thus, a common carrier by land, who has a lien on goods and is answerable for their loss by fire, may insure them for their full value.

18. Insurers must know for whom they insure. It is important to know on whom they are to depend for the care of the property insured. Not infrequently companies decline to insure persons, because they are so neglectful in caring for their property, and perhaps are suspected of destroying it wilfully.

19. The law of warranty and representation is the same in fire, as in marine insurance. A warranty is a part of the contract and must be distinctly expressed and written either on the policy, or on a paper attached to the same, forming

essentially a part of it. The warranty may be of a present, or future character. The warranty may also be a continuing one, rendering the policy void by the non-continuing of the thing that is warranted to exist. Whether it is continuing or not must evidently be determined by the nature of the thing warranted. A warranty that the roof of a house is slate, or that there are only so many fire places, or stoves, would generally be regarded as continuing ; but a warranty that a building was five hundred feet from any other would not render the policy invalid if a neighbor should erect a house within one hundred feet without any knowledge of the insured.

20. When the statements are made on a separate paper, it is usual to refer to them in the policy in such a manner that both shall form one instrument.

21. The word warranty need not be used if the language clearly imports, or means the same thing, and an indorsement on a policy before it is executed may take effect as a part of it.

22. A statement may be made in a policy which is not to be regarded as a warranty by the insured, but merely as a license or permission of the insurers that the premises may be kept in a certain way, for example, the statement that a dwelling-house "is to be hereafter occupied as a tavern."

23. A representation differs from a warranty in this respect, that it is not a part of the contract.

If made after the signing of the policy, or the completion of the contract for insurance, of course the contract itself is not affected. If made before the contract, and for the purpose of effecting insurance, a false and material representation, though forming no part of the contract, avoids the policy. The true answer to a question of this kind is whether or not the contract would have been made, and in the same terms if the statement had not been made to the insurers. If the answer is that they would have declined to make such a contract, then the statement is material, otherwise it is not.

24. A representation may be more clearly proved if it is in writing, but it will be duly considered even though it has not been put in writing. In some instances by the terms of a policy any misrepresentation or concealment avoids it. The parties have a right to make such a bargain, and when they do so, the effect of a misrepresentation would seem to be essentially the same as a warranty.

25. Concealment is the opposite of representation. The insured is bound to state all that he knows himself, and all that the insurer ought to know for the purpose of estimating correctly the risk assumed. A suppression of the truth has the same effect as expressing what is false. Insurers must be understood as knowing all those matters of common information that are as much within

their reach as that of the insured, and these need not be especially stated. But special circumstances, for example, that many fires had taken place in the neighborhood, and the probability or belief that incendiaries were at work, should be made known; and any questions asked must be answered as fully and precisely as the questions require. Concealment in an answer to a specific question can rarely be justified by showing that it was not material.

26. At the time of insuring, the property must be in existence and not on fire, nor exposed to a dangerous fire in the immediate neighborhood, because the insurer assumes that no unusual risk exists at that time. The insurers are not chargeable if the property be destroyed or injured by the indirect effect of excessive heating, or by any effect which stops short of fire or combustion. But if there be an actual ignition, or lighting, the insurers are liable for the immediate consequence, for example, the injury from water used to extinguish a fire. In some instances the policies require that the insured shall use all possible diligence in preserving his goods, and such a clause would strengthen his claim for insurance should they be destroyed after making an effort to save them by removing them. So the insurers are liable for the injury or loss sustained by the blowing up of buildings to arrest the progress of fire. As lightning is not fire, if property be destroyed

by it the insurers are not liable unless there was ignition. An explosion caused by gunpowder is a loss by fire, but not an explosion caused by steam. In science it might be difficult to distinguish between these two causes, but the law makes distinctions of its own.

27. Whether, when the negligence of the insured or his servant is regarded as the sole or direct cause of the fire or loss, the insurers can be held has been already considered. If the loss be caused by the negligence of the insured himself of a character, so extreme and gross, that it was hardly possible to avoid the conclusion that he was guilty of fraud, the defence might be a good one although there was no direct proof of it. A fire caused by the insanity of the insured would be no defence.

28. Mutual companies are usually forbidden by their charter to insure more than a certain proportion of the value of a building, and this requires a valuation in the policy which is binding, for some purposes, on both parties. Of course, the insured can never be held to pay more than the sum mentioned in the policy. But if the charter or by-laws permit a company to insure only a certain proportion of the value, three-fourths for example, and more than that sum is insured, it is not required to pay more than the three-fourths, and the person insured cannot show that the building was really worth more

than the additional one-fourth. On the other hand, the valuation, if honestly made, is binding on the insurer and it cannot prove that the building was worth less. Sometimes a policy reserves to the insurers the right to have a new valuation made in the event of loss. In such a case if a lower valuation is made, the insurers are required to pay only the same proportion of the new valuation which they had insured of the former valuation.

29. The value that insurers of goods must pay is their value at the time of the loss; and a fair sale at auction is generally taken as a correct valuation, provided the insurers had reasonable notice or knowledge that the auction was to take place.

30. Policies against fire are personal contracts and do not pass to any other party without the consent of the insurers. Policies against fire contain a provision that an assignment of the property or of the policy shall avoid the same. Of course, assignments are made with the consent of the insured. In all cases the rules or usages of the insurers in this respect must be regarded.

31. When a policy requires a certificate of the loss, this must be presented to obtain the insurance money. If the policy requires the notice to be given forthwith, there must be no unreasonable or unnecessary delay. In fire policies, as the premises are supposed to be always open to the

inspection of the agents of the insurers, a general notice of the fire will probably suffice. Of course, the insurers may waive their right of notice wholly or partly, and they may do this expressly, or by any acts that fairly indicate to the insured that they accept an imperfect notice given to them, or that they do not need, or do not require that any notice should be given to them, or that they have taken the matter into their own hands and have made inquiries and obtained all the information desired. And a refusal to settle the claim in any way has been regarded as a good excuse for not giving a notice.

32. Insurers against fire are not held to pay for losses of profits, gains of business or other remote consequences of a loss by fire. Most of the fire policies used in this country give the insurers the right to rebuild or repair premises injured by fire instead of paying the amount of the loss. If under this power insurers rebuild a house, for example, that has been insured, at less cost than the amount specified in the policy, they are nevertheless the insurers of the new building for the difference between its cost and the amount they had insured during the unexpired period covered by the policy. And if repairs are made by the insurers they must be begun within a reasonable time, which is a question of fact to be determined in the same manner as every other whenever the parties are unable to answer it themselves.

CHAPTER XVIII.

LIFE INSURANCE.

1. How life insurance is effected.
2. How the premium is paid.
3. Restrictions in the policy.
4. Death by suicide.
5. The same subject.
6. Death by the operation of justice.
7. Payment of the premium.
8. Importance of time of death.
9. The insured must have an interest in the life insured.
10. A policy may be transferred.
11. Warranty, representation and concealment.

1. Life insurance is usually effected in this country in the same manner as fire insurance, by insurance companies. An application is made by the insured, and to this questions are asked by the insurers that relate with great detail to every topic affecting the probability of life. These must be answered fully. In some cases questions also are to be answered by the physician of the person insured, and others by his friends or relatives.

2. If the insurance is for a year only, or less, the premium is usually paid in money or by a note. If the period is for more than a year, the premium is payable annually in most cases.

Sometimes a part of the premium is paid in money and a part in notes, which, however, are not paid unless the amount is needed to pay losses.

3. Policies usually contain restrictions or limitations concerning residence or travel, as the person insured is not permitted to go beyond specified limits, or places, or not without obtaining permission to do so. Sometimes, when such a permission is desired, an additional premium is demanded. The same remark may be made of persons who are employed in some trades or occupations; for example, those of making gunpowder, as well as engineers. Firemen are considered extra hazardous, and an extra premium is demanded of them.

4. The exception, however, that has created the most discussion is the one relieving insurers from payment whenever death has been occasioned by suicide. This may be voluntary and wrongful, or the result of insanity or other disease for which the suffering party should not be held responsible. If a policy is accepted which expressly declares that the amount therein specified shall not be payable if the insured shall die "by his own hand," whether wilfully, knowingly, intentionally or otherwise, and he dies in this manner, the insurer is not liable. In one of the recent cases the court remarked, "It is a fundamental condition of the contract of life insurance, even if

the policy be silent on the subject, that the insured while in a sound mental condition, will not voluntarily destroy his life. To sanction a recovery in such a case would be to reward fraud and encourage wrong doing." No one can recover anything; every party is cut off as completely as the owner of a ship who, after insuring her, causes her destruction.

5. This phrase, however, so generally used, that the insurer will not be responsible if the insured shall die "by his own hand," means intentional self-destruction, and therefore death by accident and uncontrollable impulse is excluded. But the courts have had great difficulty in deciding when death was intentional, and when it was not, in cases of suicide. The more general opinion of the courts is that death by one's own hand means, not only the act of voluntary self-destruction, but also that this is morally wrong. In other words, if a person, believing that he had a right to take his own life, should do so, he would not be regarded as dying by his own hand, and consequently the insurer would be required to pay the amount insured. The varying opinions of the courts have led insurance companies to add the clause, "sane or insane," to the former one, which covers all cases of death by one's own hand, however caused.*

* In *Life Insurance Co. v. Terry*, 15 Wallace 580, the policy contained the clause that if the insured should "die by his own

6. It was once a question whether death by order of law discharged insurers when their policy was silent concerning such an ending of the insured. Perhaps the weight of authority is in the affirmative, but the question does not now have much importance.

7. Although a policy usually is not endowed with vitality until the premium is paid, payment may be waived or delayed by the company. The taking of a note would certainly be a waiver. The premiums must be paid on the days when they fall due. If no hour is mentioned, the insured has the entire day, even until midnight to make payment. In some policies several days are allowed for the payment of the premium. If the loss happens after the premium is due and unpaid, but before its period for payment has expired," the policy was to be null and void. The court, speaking through Mr. Justice Hunt, said: "If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

pired, the insurers are bound. The utmost care is required on the part of the insured to pay his premium before, or as soon as it is due.

8. Sometimes the time of death is very important. If a policy be for a definite period, the death of the insured must be shown before the end of the period. When nothing has been heard from a person for seven years, death is presumed in some cases, and in some states such a rule is established by statute. Some companies, however, require absolute proof of the fact of death before paying a policy.

9. Every one for whom a policy is issued must have an interest in the life insured. The general rule is that any substantial pecuniary interest is sufficient, though not strictly legal or definite. This applies to a sister who is dependent on a brother for support, and also to all cases in which there was a positive and real dependence. An existing debt also gives the creditor an insurable interest in the life of the debtor.

10. A life policy may be assigned or transferred. Many policies are made for the purpose of transferring them; in other words, for the purpose of enabling the insured to give this additional security to his creditors. It is an important question, what constitutes an assignment. A delivery and deposit of a policy for the purpose of transferring it will operate in that manner without a formal written assignment. So will any transaction that

gives to a creditor of the insured a right to payment from the insurance. A delivery of the policy is necessary ; consequently if it remains in the possession of the insured, though an assignment is indorsed thereon of which the insurers have notice, the transfer is not completed. But a transfer may be effected by a separate instrument, which is duly executed and delivered, without actually delivering the policy itself. The mode of assigning or transferring policies is generally regulated by the by-laws of the insuring company, or by the terms of the policy.

11. The principles concerning warranty and representation and concealment are the same as those already considered relating to fire and marine insurance. In life policies, however, the questions cover more ground, and there are numerous difficulties springing from the answers. One precaution is for the person answering to discriminate carefully between what he knows and what he believes. If he says simply "yes," or "no," this in most cases is a warranty and avoids a policy when there is a mistake in the reply; but if he answers, "to the best of my knowledge and belief," he warrants only the fact of his belief and nothing more. In every case good faith should be observed. Thus, the policy of a person who, at the time it began to run, was wholly unconscious of his insanity, was not invalid by the concealment, although two doctors who attended on

him understood his real condition. There is a warranty or statement usually that the person insured is in good health, but this does not mean perfect health, or freedom from all symptoms of disease.* It means reasonable good health, and though this definition may be a loose one, it would be difficult to give any other.

* "The word health, as ordinarily used, is a relative term. It does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily nor ordinarily mean that he is absolutely free from all and every ill which flesh is heir to. If the phrase should be so interpreted as to require entire exemption from physical ills, the number to whom it would be strictly applicable would be very inconsiderable. The most important question on applications for life insurance is, whether the applicant is exempt from any dangerous disease, one which frequently terminates fatally. It is not usually deemed an objection that one has some slight physical disturbance of which in all human probability he will be soon relieved, although it might possibly lead to a fatal disease." Strong, J., *Peacock v. New York Life Ins. Co.*, 20 N. Y. 296.

CHAPTER XIX.

DEEDS AND LEASES.

1. Kinds of deeds ; deeds poll and indentures.
2. Quit-claim, warranty and mortgage deeds.
3. Description of the grantor.
4. The consideration.
5. Description of the grantee and the land conveyed.
6. The use of words of inheritance.
7. What is sold by a quit-claim deed.
8. The covenants or agreements in a warranty deed.
9. The remedy of a purchaser by a quit-claim against a preceding grantor, who has given a warranty.
10. The execution of a deed.
11. If the grantor is married, his wife must also execute it.
12. The witnessing of a deed.
13. The acknowledging of a deed.
14. The recording of it.
15. Nature of a mortgage deed ; the pledge of personal security.
16. Form of a mortgage deed.
17. If the mortgagor does not perform his promise, what the mortgagee can do.
18. Nature of a lease.
19. Repairs.
20. Same subject.
21. Liability of a tenant for rent if a house is destroyed by fire.
22. When rent must be paid.
23. Under-letting.

24. Who must pay the taxes?
25. He must leave at the end of his lease; a new relation is created if he remains longer.
26. What a tenant can take away with him.

1. A deed is a writing for conveying land. There are several kinds; one classification of them is into deeds poll and indentures. By a deed poll is meant a deed of one person or party to another; this form of deed is often used in New England for conveying real estate. In most of the states the deed is in the form of an indenture, which is a writing signed by two or more parties.

2. Deeds are classified in another manner into quit-claim, warranty and mortgage deeds. The difference between them will be explained before concluding this chapter.

3. A deed begins with a description of the name and residence of the person who conveys the land. The person who makes a deed is called the grantor; and the person to whom it is made is called the grantee.

4. After describing the name and residence of the grantor, the consideration for the deed is mentioned. Besides stating the amount, the deed also contains a statement to the effect that the receipt of the same is acknowledged. This statement, like that in any other receipt, is not conclusive or binding; and the truth or fact can be explained whenever justice requires that this should be done. Generally, writings cannot be

explained by oral evidence; but a receipt for money is an exception to the rule, and the exception applies to this statement, although contained in a deed, in the same manner as to any other receipt.

5. The stating of the consideration is followed by proper words indicating the grant or transfer of the land to the grantee, and also his name and residence, and a description of the land itself. This usually is very precise, or should be. Great care is taken to describe or define boundaries in such a manner that the person buying clearly knows the extent of his purchase. In the cities especially, and more populous places, a more minute description is given than in the country, where large tracts of land are sold; yet in all cases the utmost care should be used in describing its location. Usually the description concludes with a reference to the deed from which the grantor obtained his title.

6. Next are words of inheritance, as they are called. If A should sell a piece of land to B without these words, he would acquire only an interest therein for his life-time; he would have no right to sell or convey it to others. To endow him with the right to sell it whenever he pleases, or to dispose of it by will, proper words must be added to signify that the sale has been made to him so complete and perfect that he can make whatever disposition of it he pleases. These

important words are simply, "his heirs." If, therefore, A should sell lands to B and his heirs, the deed would mean in law that B could make a disposition, sale or transfer of it to any one at any time.

7. By a quit-claim deed the grantor sells whatever right or interest he may have in the land described, but nothing more. If A should discover after a few months that he really never had any interest therein, though supposing at the time he gave his deed to B that he had, and was therefore perfectly honest in the transaction, B could recover nothing from him, for the reason that he did not grant or sell anything more than his interest, or supposed interest, in the premises. If fraud were present in the transaction, then B could hold A for the consequences; but if he were innocent, and sold believing that he had good title which then was, or afterward proved to be defective, or imperfect, B, the grantee, would have no remedy or right to recover anything from him.

8. Whenever A sells land to B by a warranty deed, and the title is defective, B can recover something from him. A warranty deed usually contains four agreements or covenants. The first is that the grantor is lawfully possessed of the land sold and has a perfect title to it; secondly, that it is free from all incumbrances; thirdly, that he has a right to sell and convey the same; and fourthly, that he will, and those who represent him, his

heirs, executors, and administrators, warrant and defend the title to the grantee, his heirs and assigns, against any claim or demand that may be made by any person. When such a deed is given, if the title proves to be defective or imperfect, B can then compel A to make his loss good. The rule prescribing the amount he can recover is not the same in all the states. In some of them he can recover the money paid, with interest, after deducting the rents and profits he has received, and his legal costs and charges for defending himself in an action, if there has been one, whereby he has been deprived of his land. In other states he can recover the actual value of the land with its improvements, at the time he was obliged to abandon it, even though the amount be much larger than that paid by him. These are the two principal rules that apply in such cases.

9. It may also be added that though the grantee, by a quit-claim deed, has no such recourse or right against his grantor, he is not always without a remedy. Thus, suppose that A should sell by a warranty deed to B, who should afterwards sell by a quit-claim to C, who should be dispossessed by D. C cannot sue B, because the conveyance was only by a quit-claim; he can, nevertheless, sue A, because A warranted the title to B, which was transferred to C. In other words, A in effect transferred his title to C, although his conveyance was made to B. For this reason therefore C can overlook B and proceed against A.

10. The next element in a deed relates to its execution. The deed must be dated, signed, witnessed, sealed and delivered. By signing is meant that the seller or grantor should write his name in the usual manner in the proper place, and with ink; if he cannot write his name he may make his mark; if he should use a lead pencil this would be sufficient, but the use of ink is preferable. The deed of a corporation must be signed by an agent or attorney, who should be careful to execute it in the proper manner. Sometimes he signs so imperfectly as to make a conveyance for himself and not for his corporation. Formerly, the courts construed the form of signature by an agent with great strictness and technicality; but the modern practice is more in harmony with justice and the real intention of the signer. For example, it was once decided that a treasurer who had signed a deed thus, "In witness whereof I, the said C. C., in behalf of the said company, as their treasurer, have hereunto set my hand and seal," made a conveyance for himself and not for the corporation, and consequently did not transfer its lands. A court would hardly decide now that such a deed was a personal one, but the decision shows clearly the great care that ought to be used by an agent in executing a conveyance.

11. If the grantor is a married man his wife has an interest in his real estate, which is called dower; and in most states it is necessary for her

to unite with him in making the conveyance. If the deed is by a deed poll she is not mentioned as grantor with him in the beginning of the instrument; but in the clause in which it is asserted that "in witness whereof I hereunto set my hand and seal," she joins with him in stating that she releases all her right and interest to dower in the premises above described, and signs the deed with him. If the deed be by indenture she joins with him in the beginning, and is named as grantor, the two constituting the "parties of the first part."

12. A deed must be witnessed. In many states two witnesses are required by statute, in other states one witness is enough. A witness should see the person or persons before signing it; if a deed is signed near him, and is immediately brought to him by the grantor, who tells him that the signature is his, and asks him to witness it, this is a proper or legal witnessing. A witness ought to be of sufficient age and understanding, but may be a minor; he should have no interest in the deed, and therefore a wife is not a proper witness to such a conveyance by her husband.

13. A deed thus prepared and executed is valid between the parties, but usually something more is done. It is recorded in the books of a public office kept for that purpose; before this can be done, however, the deed must be acknowledged. For this purpose the grantor must appear before a person who is authorized by law to receive ac-

knowledgments; he shows the deed to him, and says or acknowledges that it is his free act and deed; the person receiving the acknowledgment then makes a certificate, at the bottom of the deed usually, that he has received the acknowledgment. Besides signing it, he also signifies the place and date of doing this. An acknowledgment may be made before a justice of the peace, a notary public, or any other officer properly qualified for the purpose. Commissioners are also especially appointed in all of the states to acknowledge deeds. The law is very strict in some states in requiring deeds acknowledged by persons living outside their limits to go before such persons in acknowledging them.

14. Lastly, a deed is recorded or registered in the county or town where the land lies to give notice of the transfer. When this is done the grantee or purchaser can retain possession of it against everybody, unless the title is taken away from him by legal proceedings. If this were not done, and the grantor should afterward sell the land to some one else, who should purchase it in good faith, and record his deed, he would get a good title thereto, and could hold it against the other. Consequently, a purchaser ought to leave his deed with the proper recording officer as soon as the acknowledgment is complete. Though unable to record it at once, for lack of time or other reason, the law regards a deed as

recorded from the day, hour and minute of its reception, which are therefore promptly noted by the recording officer. Of course, if no record were made, the deed between A and B would be perfectly valid; the object of recording is to guard against any attempt afterward to transfer or change the title by A or his heirs or legal representatives. By doing this B's title becomes complete against everybody.

15. We shall now consider the peculiarities of a mortgage deed. This is given to secure a person who is indebted to another. The legislatures have passed statutes whereby mortgages may now be given on personal property as well as real estate. They prescribe how such a mortgage shall be made; and if the requirements are respected the mortgagor may retain possession of his property. By the common law the difficulty in the way of making a mortgage of personal property was the fact that when retaining possession he was regarded as the owner; and if he transferred his property to another, who paid for it in good faith, he acquired a valid title; and consequently a mortgagee could not take such security with the certainty that it would be preserved. Of course, there was no difficulty in mortgaging personal property whenever its possession was transferred to the mortgagee. But whenever the mortgagor retained it, then there was danger of its sale to others, or seizure by his creditors.

16. In making such a conveyance the form of the deed is usually the same as a warranty deed, with the addition of a condition stating the indebtedness of the grantor or mortgagor to the grantee or mortgagee, by a note, or in some other manner, for a specified sum of money, and that the object of the conveyance is to give him security therefor, and that if the money is paid, or the condition is properly performed, then the conveyance is to be regarded as never having been made. If, therefore, the grantor fulfills his pledge, pays the money promised, for example, or performs the condition, whatever it may be, then his title or interest in the land is regained, and the mortgagee gives him a release or quit-claim deed, which is also put on record, clearly showing that his title is without any flaw.

17. Such is the nature of a mortgage deed. If the pledge is not fulfilled, then the mortgagee has a right to take possession of the land; meanwhile he has acquired a qualified title thereto by his mortgage, although the mortgagor usually remains in possession; for this he can do without impairing in any way the mortgagee's title or ownership. There is no risk on his part in permitting the mortgagor to occupy the land as he did before; but when the time arrives for fulfilling the pledge, if he fails to do so, the law prescribes how the mortgagee may take possession of the land and

become the absolute owner. This cannot be done instantly; some steps are required before he can enter into possession and acquire a complete title to the land as though he had always been the owner. These steps are defined by statutes, and somewhat differ in the states. Generally it may be said that the mortgagee is required to begin a legal proceeding, describing the nature of his claim, and of the mortgage given to him to secure it, that it has not been paid or fulfilled, and he asks the court to fix a time at which, if the claim shall not be paid, his title to the land shall be regarded as perfect. The court, after listening to such a petition or application, fixes a time; and if prior to this the mortgagor pays or redeems the claim of the mortgagee, then he can once more become the absolute owner of his land; otherwise, the title and possession are transferred to the other. Sometimes the mortgagor disputes the claim, or the amount, and then evidence is introduced on both sides as in an ordinary trial, and the court makes such an order or decision as justice and equity seem to require.

18. Another form of conveyance relating to land is for a shorter period, often for only a year or two, and this is a lease. It is simply a contract whereby the owner or landlord grants to another, the tenant, the right to take possession of land for a specified time, for the use of which a rent is taken or reserved as a compensation.

Generally, when land is leased, a written lease is made between the parties, and this is very desirable, for the reason that if it is not done the common law imposes some very severe requirements on the tenant. The common law principles defining the duties of a tenant are stamped strongly with a foreign origin, and at a time when the rights of the tenant were few and when the landlord was a more important personage in society than he is to-day. These principles have been imported from the English law, and are incorporated into the American system, though they have been largely modified by statute, and to some extent by the courts. But the safer way is to put all the terms of the agreement between the parties in writing, and thus each understands his duties and liabilities. In the absence of an agreement relating to the use and occupation of land, it may be remarked that the landlord is required to put his tenant into possession; if he agrees or covenants to renew the lease, this means a renewal on the same terms though without an agreement for another renewal.

19. Unless something is said in a lease, the landlord is not required to make any repairs. If the house is dilapidated and disfigured, and the locks, blinds, doors and windows are out of order, the tenant nevertheless can claim nothing of the landlord. Even if it becomes wholly uninhabitable in consequence of fire, or is blown down, or is

flooded, the landlord is not bound to do anything unless he has agreed to do so in the lease. If, however, the house is uninhabitable by its own fault; for example, if it is overrun with rats, or so decayed that the weather invades it, the tenant may leave, whenever he did not know of these peculiarities and imperfections at the time of entering. An eminent legal writer has thus stated this principle, he can leave provided the objection or defect be not one which the tenant knew or anticipated, or would have known or expected if he had made reasonable investigation or inquiry before he took his lease.

20. A tenant is not bound to make general repairs without an agreement, but he must make those that are necessary to preserve the house from injury by rain and wind. If, for example, shingles or slates are blown off, or panes of glass are broken, they must be replaced; and it is said that he would be bound even for ornamental repairs, like paper and paint, under an agreement to return the house in good order. A tenant of a farm is bound, unless the lease mentions otherwise, to manage and cultivate the same by the rules of husbandry practiced or observed in his vicinity. A farm tenant, if his lease is terminated by any event which is uncertain, and could neither have been foreseen nor foretold, is entitled to the annual crop sown or planted while he was in possession.

21. If the house is wholly destroyed the tenant

must still pay the rent, because the law regards the land as the principal thing, and the house as secondary; and if a tenant should covenant or agree "to return and redeliver the house at the end of the term, in good order and condition, reasonable wear and tear only excepted," he would be bound to rebuild the house if it were burned down. This requirement of the tenant clearly shows the need of a written lease, unless he is willing to assume the risk of fire during his tenancy.

22. The times for paying rent are usually specified in the lease; if not, the tenant would be governed by the usage of the country or place where he lives.

23. If nothing is said about under-letting he has a right to do this, but remains bound to his landlord for his rent.

24. A tenant is not responsible for taxes unless it is expressly agreed that he shall pay them.

25. If a lease be for a fixed time the tenant loses all right or interest in the premises or land at the expiration of the lease; and he must leave, or the landlord may turn him out at once. If, however, he holds over after the lease has expired, with the landlord's consent, he is then called a tenant at will, and he cannot be turned out without a notice. The statutes of the several states have prescribed the length of notice that must be given; often it is thirty days, sometimes sixty days, or even longer.

26. It is important to know what things the tenant can take away with him at the end of his lease. With respect to many things there is no question; for example, a person can remove all his furniture and movable property. Often there are many things affixed to the house by the tenant which he desires to remove if he has the right to do so; and the question relates to these. The method of affixing them is the test usually applied to determine whether they can be removed or not. If they are affixed with screws, or in such a way as to show that their removal was intended, they may be taken away. In modern times the rule has been extended in favor of the tenant, and whatever he can remove without injuring the premises and leave them in as good order as they would otherwise be, may be taken away. For example, ornamental chimney pieces, coffee mills, cornices, that are affixed with screws, furnaces, fire frames, stoves, looking glasses, pumps, gates, rails, posts, barns or stables on blocks.* On the

* If a fixture is erected for the purpose of trade, Justice Story remarked in *Van Ness v. Pacard*, 2 Peters 146, that the question whether it is "removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small building, or a soap boiler of one or two stories high, and on whatever foundations he may choose." In *Hill v. Sewald*, 53 Pa. 273, Justice Agnew re-

other hand, a barn placed on the ground could not be removed, nor benches fastened to a house, nor trees, plants and hedges not belonging to a gardener by trade, nor locks and keys. Of course, all these matters may be changed, and often are, by a written lease. Different rules from these are applied between mortgagor and mortgagee, and grantor and grantee. If a man sells a house, for example, the law favors the buyer, and he may hold many things that an outgoing tenant might remove. Of course, a seller could take what he pleased from his house before selling it; and he can make whatever bargain he chooses concerning the fixtures, otherwise the rule does not permit him to move anything of a permanent nature.

marked, "Unquestionably, the intention to annex is the true legal criterion. It is on this principle that when one fixes his own chattel on the land of another, it is in legal effect a gift of it to the owner of the land. The same want of intention to convert is imputed to a tenant who attaches to the land fixtures for the use of his business, the law presuming in favor of trade that he meant to remove them before the end of his term; and it is only on leaving them without removal, the intention to make a gift of them to the landlord is imputed to him."

CHAPTER XX.

CORPORATIONS.

1. Importance of knowing the authority of corporations to make contracts.
2. What are *quasi* corporations.
3. Corporations sole.
4. Corporations aggregate, and how they are classified.
5. Foreign corporations.
6. Ways of creating corporations; how a legislative charter is obtained.
7. Creation of corporations by complying with the requirements of a general law.
8. Duration of a corporation.
9. It lives through successors and not heirs.
10. The authority of a corporation is granted and continued by the state.
11. Its use of a seal.
12. The authority or privilege conferred on it is called a franchise.
13. Every corporation must have a name.
14. The shareholders, their annual meetings and selection of directors.
15. The authority and liability of directors.
16. Directors can only act as a body.
17. How far is it affected by any knowledge acquired by a director of its affairs.
18. Authority of the manager of a corporation, to what extent it is bound by his conduct.
19. Its liability for his criminal acts.

20. A corporation can sue and be sued like an individual.
21. It can own real estate.
22. How shareholders may be represented at the annual meetings.
23. Their liability.

1. As a vast amount of business is now transacted by corporations, every one ought to understand their authority to make contracts, and their liability for their wrongful conduct. The law relating to the wrongs done by them has been often changed, and even now many questions of this nature are not clearly settled.

2. There are many kinds of corporations. The term *quasi* is applied to some of them, by which is meant associations or institutions that resemble corporations in some ways, but not in all. The supervisors of a county, the trustees of public schools and similar officers, are clothed with well defined powers. For example, the supervisors of a county can own and manage real estate for its use. These bodies can sue and be sued like other corporations, and are therefore thus regarded.

3. Another kind of corporation is called sole, which is a corporation formed by a single person, a king or queen. Such corporations are not very frequent in the United States, yet exist to some extent, especially in the church. A bishop is sometimes invested with the title and keeping of property given for church purposes, and consequently is a corporation of this character.

4. Most of the corporations in this country are called corporations aggregate, and are divided into several classes. First, religious corporations that are organized for religious purposes. Secondly, corporations which embrace all that are not religious, and are divided into charitable or eleemosynary and civil. Illustrations of eleemosynary or charitable corporations are religious academies, hospitals and the like. Civil corporations are again divided into two classes, public and private. Public corporations are formed for governing, of which cities and towns are examples. They are often called municipal corporations, and are created by the legislatures of the states wherein they exist. They possess no natural or original authority; only such as are given to them by positive law or legislation. Some have contended that a town is an original form of government, possessing all inherent authority not taken away by the state or the federal government. Though town governments in the New England states are much older than city or county governments, yet they derive, like them, all their life and authority from a legislative source. Lastly, private corporations may be mentioned, which are founded for private purposes and are the most common. Insurance companies, railroads, banks and the like, are private corporations. To some extent however they are public corporations, because they derive their authority from a public

source, and because the legislature may make regulations concerning them. A railroad or a telegraph corporation, though classed as a private corporation, may be taken by the state, after paying for it, because it is created by the state and is of a public character. If it were not, it would have no authority to take and use the land of individuals for the purpose of building its road. Besides, the state can, if such a policy be deemed expedient, regulate the rates for carrying passengers and freight. This could not be done if it were strictly private like a man who is conducting his business, either alone or in company with a few other persons.

5. Lastly may be mentioned foreign corporations, which are those that act outside the state of their creation. An insurance company created by the state of New York that is doing business in Illinois is regarded in that state as a foreign corporation.

6. Corporations are created in two ways; by a general law and by charter. The oldest method or way of creating a corporation is by an act of the legislature. The persons who desire to form a corporation give notice before the meeting of the legislature of their intention to apply to that body for the creation of a corporation. On assembling a petition is presented through a member, setting forth this fact or wish, and accompanying it is a bill describing the powers which they desire to

have conferred on them. The petition is referred to the appropriate committee, a report thereon is made and discussed by the respective houses, and if the bill is considered favorably and signed by the governor, the associators are endowed with the powers described therein. Charters are monopolies, and in the olden times especially were regarded as very valuable. Their creation gave rise to many abuses; furthermore, the method was too slow for the demands of modern business, and so another mode has been adopted of accomplishing this end, more speedy and effective.

7. This is by enacting general laws providing for the creation of corporations. In probably every state there is a law of this character, prescribing conditions on which corporations can be formed; and besides this general law, some states also have other laws providing especially for different kinds of corporations, like railroads, banks and insurance companies. These laws provide that an application must be made to officers who are named, who examine it, and when the associators have given proper notice of their formation, paid in their capital, elected their directors and complied with every other legal requirement, the corporation is born, endowed with a real life. The purpose of the corporation must be specified; returns of their operations are usually required; often they must submit to examinations by public officers. One of the marked differences between

corporations thus organized and those existing by charter is, that those of the same class or kind possess similar powers; while those chartered by the legislature are often endowed with powers more varied and extensive. These have been greatly minimized by the newer method of organizing them.

8. A corporation is often regarded as a perpetual body; of late years a shorter term has been given to them. The national banks, for example, are chartered for a period of twenty years, and many of them have had their charters renewed, and are living during the second period of their existence. A corporation never dies in the same sense that death overtakes an individual. Its members change, they indeed die, but others take their places. A corporation may be likened to a river, ever changing, yet ever flowing.

9. A corporation has no heirs like an individual, no persons who inherit. A corporation continues through succession, one member succeeds another, like the leaves on a tree; in this way its life is preserved.

10. The authority of a corporation depends on the will of the legislature; it is a creature of the state. It has such powers as are expressed in its charter, with such incidental powers as are needful for their effective execution. Formerly, a corporation could not hold property for the use of another, it could not be a trustee; but now a cor-

poration can transact such business if the authority has been properly conferred. In many of the states they often act as executors and administrators of estates.

11. A corporation has a seal; a partnership has none. Once it was said that the seal must always be used in the transaction of its business; it could not express an intention by any personal act; it had no soul, it could not speak, but only make an impression. But this view of a corporation was found to be too limited; its business became too extended to be transacted in this slow manner; consequently it was long ago declared that a corporation could make verbal contracts through its executive officers in the same manner as a partnership. How badly fettered would a railroad be if obliged to affix a corporate seal to every freight contract made by its agents. Very many things therefore may be done to which a corporate seal is not necessary to make them legal.

12. The authority or privilege conferred on a corporation is called a franchise. *Quasi* corporations have no privileges or franchises. This is one of the marks that distinguishes them from other corporations.

13. Every corporation must have a name by which it is known. Corporations in the same state should not have a similar name; nor would one be intentionally granted to a second corporation.

14. The property of a corporation is owned by

persons called shareholders or stockholders. The property is divided into shares, usually one hundred dollars each; sometimes for only half that amount; while corporations are formed, especially for gold and silver mining, whose shares are much less. For titles or evidences of ownership certificates are given. Every shareholder therefore has a certificate or writing setting forth that he is the owner of one or more shares. Once a year they hold an annual meeting for the purpose of choosing directors, one of whom is afterward chosen by them to be the president. Whenever a director resigns or dies, the vacancy may be filled by the others until the next annual meeting. If the annual meeting is not held, the directors continue in office until their successors are chosen; their duties do not expire with the year for which they are elected.

15. The authority and liability of directors are defined by charter or statute, and also by the common law. Their liability is not so great as many suppose; they are directors in the sense of acting as advisers; but they are not managers, and are not responsible for the ordinary management of their association. An eminent justice whose opinion has been often quoted with approval, has declared that directors are not liable unless they have been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or would have prevented the per-

petration of a fraud by them had they given ordinary attention to their duties. They are not to be judged by the same strict standard as the agent or trustee of a private estate, for if they were, no men of character and responsibility would be found willing to become directors.* Suppose a person is a director of a bank, and neglects to attend the usual meetings, and the cashier should steal a large amount of money, would he be liable for the amount by reason of his non-attendance? The law does not positively require that he should attend them, and consequently he is not responsible if he stays away.

16. A director has no authority to act separately and independently of his fellow members. Only as a board, duly convened, is he a representative of the corporation. If, therefore, each one should separately, outside a board meeting, assent to an act, it would not be a corporate act and binding on the company. They must act together to act effectively. But they may ratify or approve the acts of their president or other officers in an informal manner.

17. As a director truly represents and binds his corporation only when thus acting, does any knowledge acquired by him concerning its affairs

* Justice Sharswood, *Spering's Appeal*, 71 Pa., 21, quoted with approval by Chief Justice Fuller, *Briggs v. Spaulding*, 141 U. S., 132.

affect or bind the institution? On one occasion it was remarked that "a notice to a bank director or trustee, or knowledge obtained by him while not engaged either officially or as an agent or attorney in the business of the bank, is inoperative as a notice to the bank." If this were not the law, "corporations would incur the same liability for the unofficial acts of directors that partnerships do for the acts of partners; and corporate business would be subjected oftentimes to extraordinary confusion and hazards. Any director would have as much power as all the directors. A single trustee or director has no power to act for the institution that creates his office except in conjunction with others."*

18. The authority of the president, manager and other leading officers is defined either by statute or charter or by the common law. Whenever specific duties and liabilities are not prescribed in these ways, they have authority to act within the scope and usages of the business to which their conduct relates, and are liable if they exceed them. Thus, if a person is a general agent of an insurance company, he has authority to transact the business falling within the limits of such a general agency. In other words, he can go as far in binding his company by his acts as the agent of an unincorporated

* *Fairfield Savings Bank v. Chase*, 72 Me. 226.

principal. As the United States Supreme Court has remarked, "Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances."* A cashier of a bank, therefore, would bind his institution by his acts so far as they were within the the scope or usage of the business, even though in doing so he violated his private instructions. If, for example, though having no authority to certify a check beyond the amount of the maker's deposit, he should do so, the bank would be bound by his act, because it is within the scope of his authority to certify checks. A corporation can act through an attorney like an individual.

19. For a long time the law was not well defined concerning the liability of a corporation for the acts of its agents, and especially those done by them of a criminal nature. Corporations are liable for every wrong of which their officers are guilty, and cannot be shielded by showing that their officers had no authority to do them. Such an extension of the rules of law has become necessary in order to deal properly with the irregularities of the representatives or agents of corporations.

* *Merchants National Bank v. State National Bank*, 10 Wallace 604.

20. Corporations can sue and be sued in the same manner as individuals. This authority and liability is prescribed by statute and is important to their life and power. If a corporation could not sue it would be crippled in the transaction of its business ; on the other hand, if it could not be sued, it would not be safe for others to do business with it. Its liability to sue and be sued is very general, extending to contracts, negligence, and wrongs of all kinds.

21. A corporation can hold and sell real estate. Some limits have been put on corporations in these regards. The national banking law prohibits a bank from holding more real estate than is needful for banking purposes ; and it cannot even take real estate to secure a note that is discounted in the beginning, though it may do this afterward as an additional security. If it should acquire a complete title to such estate by proper legal proceedings, it could not hold it forever, indeed, for no longer period than five years. The bank would then be obliged to sell, whatever might be the price obtainable. The reason for thus restricting corporations in the holding of real estate is to prevent them from getting possession of too much. There was a time in English history when corporations were owners of vast quantities of real estate, and a law was passed forbidding them from holding any, and this law was applied in the American colonies. It has, however, been so far

modified that most corporations can hold whatever real estate may be necessary for the transaction of the business in which they are engaged. For example, a railroad company can buy land for its way, for stations and offices, but it cannot buy land for ordinary investment or speculation.

22. Once a year an annual meeting is held of the shareholders for the election of directors. At this meeting the shareholders either are present and vote, or they are represented by others ; very frequently they give an authority, called a proxy, to some other person to act for them. Not unfrequently an annual meeting is held at which two or three persons act for a very large number of shareholders. Usually each shareholder is entitled to a vote, but sometimes a charter provides that he can have only one vote notwithstanding the number of shares that he may own.

23. Lastly, the liability of shareholders is determined by charter or statute. The shareholders of national banks may be liable to creditors for an amount equal to the par value of their stock. For example, if a bank possessing a capital of \$1,000,000 should fail owing depositors \$1,000,000, and the assets or funds remaining should amount only to fifty per cent. of this sum, the shareholders would be obliged to contribute \$500,000 more to pay the creditors. One reason why corporations are formed is to limit the liability of shareholders ; for if they acted as partners, then

each one would be liable for all the debts of the concern. In a general sense all the shareholders are partners, interested in the common business, sharing its profits and losses, but their liability is limited. Every shareholder knows in the beginning that he cannot be rendered liable above the amount prescribed by law. This is one of the chief reasons for the rapid growth of corporate business institutions

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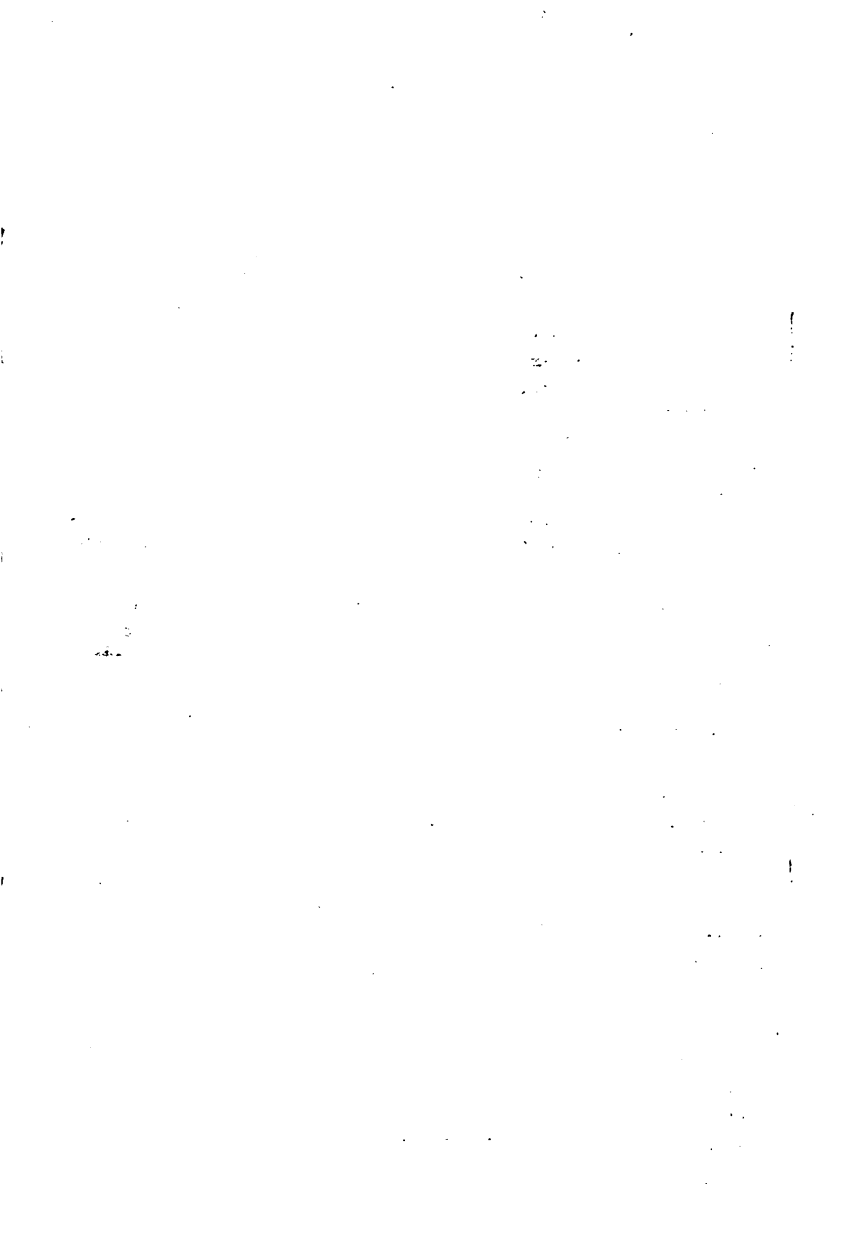
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